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THE CONSTITUTIONAL RIGHTS & DUTIES IN INDIA

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PREFACE

"In our universities, the study of Indian Constitutional law is confined to the bare structure of the administration. The vital principles are taught through Dicey and therefore without the necessary Indian setting". This remark was made by the Rt. Hon'ble Sir Tej Bahadur Sapru in 1927 in one of his evening *durbars*, which as everybody, who has attended them, knows, are intellectual treats of a high order. I took up the study of the subject as suggested by Sir Tej Bahadur Sapru but for certain reasons gave it up after sometime.

Years later Sir Maurice Gwyer, the first Chief Justice of India, asked me to complete my study and the following pages are the result. Sir S. Varadachariar has done me the honour of going through them in typescript before they were sent to the press.

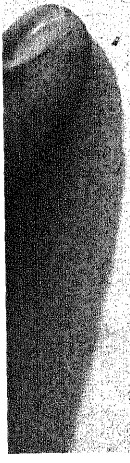
I am deeply grateful to these great authorities on constitutional law for their advice and guidance and encouragement.

Even so, I should never have thought that my work had the merit to jusrify my presenting it to the legal world. The stoutest heart may well quail before the task of re-writing Dicey in an Indian setting.

There is perhaps some appropriateness in publishing this book of the most critical period of India's constitutional history. Since it went to the press, Prime Minister Attlee has said in Parliament that law and justice are among the heritages received by India from Britain. The present monograph deals with "law's rule" established by Britain in India. It will be the task of free India to convert it into "rule of law".

Delhi Gate, Delhi.
March 21, 1946.

B. Banerji.



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CHAPTER I

The Question of Fundamental Guarantees.

In the Government of India Act, 1935, India has got a written and rigid Constitution. But it contains no fundamental guarantees. In this it resembles the other constitutions of the Empire, with the exception of the Irish Free State, and is in contrast with the constitutions of America and of the Continental countries.

In the Round Table Conferences the Indian delegates pressed for the inclusion of a Charter of Rights in the Constitution. But the Joint Parliamentary Committee[1] substantially negatived the plea. It quoted the opinion of the Simon Commission in its support. It, however, recommended a limited number of rights to be placed beyond the reach of the Indian Legislatures. The list was narrower than even the one accepted by His Majesty's Government in the White Paper.[2] Among the list were included the eligibility to public office, saving of the Punjab Land Alienation Act, and sanctity of property and Crown Grants. The Committee's recommmendations on this behalf led to the enactment of Sections 298, 299 and 300 of the Constitution Act.

The demand of the Indian delegates was born of the consciousness of a large volume of repressive legislation on the Statute-book. The executive in India had had, for reasons into which we need not enter, to curtail, oftentimes drastically, the consitutional liberties of the subject. For that purpose it got the Legislature to pass a number of repressive laws. Up till 1921, when the Montagu-Chelmsford Reforms were inaugurated, the Legislature was nothing but an expansion of the Executive Council for the purposes of making laws, and the executive had no difficulty in getting legislative sanction for its measures, sometimes in the teeth of severe opposition. Even now, under the Constitution Act of 1935, the Executive can get legislative sanction for any measure it sets its heart upon.

This led to attempts by lawyers to find some way to check the serious inroads on the subject's liberties. Advantage was sought to be taken of the subordinate position

1 Para 367.
2 Para 75.

of the Indian Legislature. The English liberties were enshrined in the Great Charters, the Magna Carta, the Petition of Rights, the Bill of Rights and the Act of Settlement. These were parliamentary enactments. Could not the courts be persuaded to hold that these parliamentary enactments were in force in India as the fundamental laws of the country and that any Indian legislation that came in conflict with any of them was of no effect whatsoever?

Arguments advanced in support of the proposition that the parliamentary enactments were in full operation in India were three-fold: (a) that the Queen's Proclamation of 1858 made the constitutional principles governing the British Crown binding on the courts as laws. (b) that Sec. 65 (2) of the old Constitution, Government of India Act, made the English constitutional charters operative in India and (c) that the connection between India and England led to the introduction of the English law in this country and with it the constitutional charters.

It is instructive to examine how these arguments were dealt with by the Courts.

(A)—The Queen's Proclamation, 1858.

The Proçlamation was made to mark the assumption by the Crown of the direct government in India from the East India Company. What the Proclamation was designed to achieve is best gathered from the following passage in the letter that Queen Victoria wrote to the Earl of Derby: "The Queen would be glad if Lord Derby would write it himself in his excellent language,—giving them (i.e. the Indian people) pledges which her future reign is to redeem and explaining the principles of her Government. Such a document should breathe feelings of generosity, benevolence and religious feeling, pointing out the privileges which Indians will receive in being placed on an equality with the subjects of the British Crown". In the Proclamation itself the following passage occurred: "We hold Ourselves bound to the natives of our Indian territories by the same obligations of duty which bind us to all our other subjects; and these obligations by the blessings of Almighty God We shall faithfully and conscientiously fulfil". What are the legal effects of these words? There are matters dealt with in the Proclamation which concern the Prerogative, e. g., amnesty, under certain conditions, to those who had taken part in the Mutiny. They

were binding in law.[1] But were the other provisions equally binding in law ? Or in other words, could the Crown legislate by Proclamation for India in 1858?

That in England law cannot be enacted or altered by Proclamations is beyond question. In a note to his published charge to the Grand Jury in *R vs. Eyre*,[2] Lord Chief Justice Cockburn said: "The law on the subject is fully discussed and settled by Lord Coke with his accustomed weight and learning in a memorandum under the head of 'Proclamations' in the 12th part of his reports p. 74. The result of his reasoning and of the authorities he cites may be briefly stated. Besides such as are issued in furtherance of the executive power of the Crown, proclamations which either call upon the subject to fulfil some duty which he is by law bound to perform or to abstain from any acts or conduct already prohibited by law, are perfectly lawful and right; and it is said that if, after such a proclamation, the law is nevertheless broken, the disobedience of royal command, if not of itself a misdemeanour, is at all events an aggravation of the offence. On the other hand whenever a proclamation purports to be made in the exercise of legislative power—as, if the sovereign grants a monopoly or privilege against the rights of the rest of the community or imposes a duty to which the subject is not liable by law, or prohibits by penalties what is not an offence at law, or adds fresh penalties to any offence beyond those to which he is already liable—the proclamation is of no effect, for the Crown has no legislative power except such as it exercises with the other two branches of the legislature. The king, says Comyn, cannot by proclamation alter any part of the common law, statutes or custom of the Realm."

But the Crown by virtue of the Royal Prerogative is entitled to legislate for possessions acquired by conquest or cession.[3] Did the Crown have this right with respect to India in 1858 when the Proclamation was issued ?

For a long time there were in India double *de jure* sovereignties, of the British Crown and of the Moghul Emperor. The Moghul Emperor did retain his last attributes of sovereignty till his deposition after the mutiny of 1857. In *Raja Saligram vs. Secretary of State*[4] the Privy

1 *Janki Prasad vs. Rai Pratap Chand* 1897 A.W. N. 129 *Gangabai vs. Charles Swinton* 2. Ind. Jurn. N. S. 124 at p. 132.

2 Ridgway 1867 (Quotation is from Forsyth's "Cases and Opinions" Ch. V notes p. 180).

3 *Compbell vs. Hall* (1774) 1 Cowp. 204=98 ER. 1045 followed in *Samut vs. Sricklaad* A. I. R. 1939 P. C. 39.

4 (1872) 18 W.R. 389.

Council held that his status was that of a sovereign. The Crown's sovereignty over the country might be said not to have been complete till the sovereignty of the Moghul Emperor ceased absolutely to exist.[1] Even so India was not a new addition to the Crown's dominions in 1858, so as to entitle the Crown to legislate by the Royal Prerogative. Apart from the reservation about sovereignty made in the early charters, when the East India Company was a trading concern and not a territorial power, there was the express declaration of "the undoubted sovereignty of the Crown over India" in the Charter Act of 1813 and the declaration that the territorial possessions were held by the Company "in trust for His Majesty, his heirs and successors, for the service of the Government of India"[2] in the Charter Act of 1833. Beginning with the Regulating Act of 1773, there was a series of Parliamentary enactments relating to the government of India. By the Charter Act of 1833 a general power of legislation was given to the Governor-General in Council. There was therefore no Prerogative right of legislation for India in 1858 and the Queen's Proclamation cannot be said to enact any law for this country. In *Damodar Gordhan vs. Deokaran Kanji*,[3] the Bombay High Court said : "That Her Majesty's subjects in India have the same rights with all her other subjects, is clear from the Queen's Proclamation of 1858". This, it is submitted, does not imply that the Proclamation was law. Rather it was the declaration of the law that "the Queen must govern according to the fundamental rules of English law."[4]

(B)—Section 65 (2) of the Old Constitution Act.

The relative portion of the section was worded as follows: "The Indian Legislature has not power to make any law affecting the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or affecting the sovereignty or dominion of the Crown over any part of British India." It was first enacted

1 Rights of paramouncy over the Indian States exercised by the East India Company were possibly derived from the Moghul Emperor and passed on to the British Crown in 1858.

2 See *Secretary of State vs. Kamachee Boye Saheba* (1859) 7 M.I. A 476.

3 (1876) 1 Bom. 367 at p. 381.

4 Ibid per Lord Cairns L.C. at p. 410.

in the Charter Act of 1833 and continued to be on the statute book right up to the time the present Constitution Act[1] came into operation.

In 1870 the constitutional validity of Bengal Regulation III of 1818 was challenged as contravening the said unwritten laws and constitution of the United Kingdom. The Regulation authorised detention without trial for an indefinite period under the orders of Governor-General in Council, One Ameer Khan, said to be a merchant of Calcutta, was arrested and detained under the Regulation, first in Gaya and then at Alipore. The writ of habeas corpus was moved for and a rule nisi was granted by Norman J. In his judgment[2] discharging the rule, he first dealt with the question of allegiance. He quoted the principle in *Calvin's case* and proceeded to observe: "The King cannot interfere with the liberty of the subject nor deprive him of any of his rights. No man can study the history of England or can read the great judgment passed by the High Court of Parliament by the Bill of Rights on King James II without seeing that on the faithful observance by the sovereign of the unwritten laws and constitution of the United Kingdom, as contained in the Great Charter and other Acts I have mentioned, depend in no small degree the allegiance of the subject. It would be a startling thing to find that rights of so sacred a character could be taken away by an Act of the subordinate legislature. It should be observed that the proviso is not that no law shall be made contrary to the Magna Carta, or any other similar statute. Had that been the case probably it would not have been competent to the Indian Legislsture to pass any enactment in the nature of suspension of Habeas Corpus Act. But the unwritten laws or constitution of the United Kingdom is of a more flexible character, It would admit of a relaxation of the rules securing private rights in times of public distress or danger. An Act for the suspension of Habeas Corpus Act in such times is no violation of the constitution.....The Regulation differs from Acts passed for the suspension of Habeas Corpus Act in this.....that it is not a temporary Act; but the principles which justify the temporary suspension of Habeas Corpus Act in England justify its permanent suspension in India because of the peculiar circumstances of the country."

1 26 Geo. 5 Ch. 2.
2 *In re Ameer Khan* (1870) 6 B.L.R. 392 at pp. 451-455.

The appeal[1] from Norman J's decision was heard by Phear and Markby JJ. who delivered separate but concurring judgments. Phear J. held that the detention of a subject for a limited period, however long, by the Governor-General in Council under the authority of a local Act, could not be said to affect the Queen's prerogative right to enquire, on a complaint duly made, into the cause of an alleged imprisonment, to release those found on such enquiry to be unlawfully confined, and so to protect the liberty of her subjects, and the element of indefiniteness in the Regulation did not alter the principle His Lordship observed that the right to rebel in extreme cases of interference with personal liberty of the subject was based on sentiment and was not a fundamental law of the Realm. Markby J. held that there was not any connection whatever between the prerogative of the Crown and the liberty of the subject and that the allegiance of a British subject in no way whatever depended on the existence or non-existence of such a power as was conferred on the Governor-General by the Regulation. His Lordship further held that the doctrine of reciprocal obligations of protection and allegiance between the sovereign and the subject was wholly inadmissible in any legal consideration and went on to observe as follows: "It appears to me that if we are to admit such a doctrine as this at all, we must admit it not only with regard to the Acts of the Indian Legislature but to Acts of English Parliament. But whatever phrases may be picked up here and there in text books, I have never heard of an Act of Praliament being questioned on this ground."

The consideration of the scope of the section came up before a Special Bench of the Madras High Court when the constitutional validity of certain provisions of the Press Act of 1910 was challenged.[2] Abdur Rahim, C.J. Acting, defined "unwritten laws" as "generally speaking the laws recognising the fundamental right of the subject to enjoyment of personal freedom and property of which he could not be deprived except by the sentence of a Court of law." With reference to Markby J's dictum his Lordship observed: "I may point out with great respect that there is a fundamental difference between the legislative powers of the Imperial Parliament which, according to the theory of English Constitution, can enact any law it chooses and the authority of the

1 6. B.L-R. 459 at p. 565.
2 *Besant vs. The A.G. of Madras* (1916) 37 I.C. 525 at p. 580

Indian legislature which is purely derivative and subordinate. Any enactment of the latter in excess of its delegated powers or in violation of the limitations imposed by the Imperial Parliament is null and void."

On appeal to the Privy Council,[1] their Lordships of the Judicial Committee found themselves unable to appreciate the Chief Justice's observations regarding "unwritten laws"

The question again came before their Lordships soon after in a Punjab martial law case.[2] The Privy Council observed: "It is not easy to understand how the substitution for the ordinary Indian Courts—which are themselves of statutory origin—of another tribunal of a judicial character can be said to affect in any way the unwritten laws or constitution of the country; but apart from this observation the argument seems to rest upon a misconception as to the meaning and effect of the sub-section. The sub-section does not prevent the Indian Government from passing a law which may modify or affect a rule of the constitution or of the common law upon the observance of which some person may conceive or allege that his allegiance depends. It refers only to laws which directly affect the allegiance of the subject to the Crown as by a transfer or qualification of the allegiance or a modification of the obligations thereby imposed".

(C)—Introduction of English Law into India.

The question of introduction of English law in India as *lex loci* has been the subject of much debate in the Courts and among men learned in law.[3] It is of interest to the student of constitutional law, for, if English law as such is in force in any part of the country, the constitutional rights and remedies under that law are available to the inhabitants of that part.

The old English decisions as to the applicability of English law to the countries coming under the sovereignty of the British Crown are not of much help in this regard. For the extension of this sovereignty over India has been made in gradual stages and through different processes. The common law of England recognised "a great difference between

1 *Besant vs A G. of Madras* (1919) 46 I A. 176 at p. 191.
2 *Bugga vs. Emperor* A.I R. 1920 P.C 23 at p. 26
3 The Law Commissioners in their Special Report (1842) devoted a most illuminating chapter to this topic pp. 440-442. See also Notes to Chapter 1 in Forsyth's "Cases and Opinions" pp. 32-34 and Introduction to Morley's Digest.

the case of a colony acquired by conquest or cessation in which there is an established system of law and that of a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions."[1]

In the case of settlements, indeed, it is true that "let the Englishman go where he will, he carries as much law and liberty with him as the nature of things will bear."[2] As was observed in Comyn's Digest, article "Ley" (c)[3] ; "The Common Law is the inheritance of all the subjects of the realm and therefore in the plantations or elsewhere, where colonies of the English are settled, . they are to be governed by the law of England, So if a foreign territory not inhabited be obtained by the Crown of England, all laws of England bind there." So also Lord Blackburn[4] : "When the Province was founded by the English settlers who went out there, those English settlers carried with them all the immunities and privileges as those who remained in England."

In the case of a country conquered by the British arms or ceded by a foreign power the question becomes more complicated by factors such as the existence of a treaty with the power defeated or ceding, or of laws prevalent in that country before the conquest or cessation and whether they are suitable for the conquerors or not. Treaty obligations are always paramount and it was held,[5] on the question of application of English law to Mauritius, that "having been surrendered on the condition that the inhabitants preserve their religious laws and customs, the Court must look to the law of France as established in the colony before that event."

It was laid down in the celebrated *Calvin's case* (1608)[6] that "if a Christian King should conquer the kingdom of an infidel, and bring them under his subjection, then ipso facto the laws of the infidel are abrogated, for that they are not only against Christianity but against the laws of God and of nature contained in the Decalogue , and in that case,

1 *Cooper vs. Steuart* (1889) 14 App. Cas 286 at p 291 See also *Mayor of Lyons vs. East India Co.*, 1 Moore's Indian Appeals p. 175 at pp. 270-1 also *Freeman vs. Fairlie* Ibid p. 305 at pp. 323-4.
2 Opinion of Mr. West (1720) referred to with approval by Norman J. in *In re Ameer Khan* 6 B. L. L. 392.
3 Quoted in Forsyth's "Cases and Opinions" p.17
4 *The Lauderdale Peerage* (1885) 10 App Cas 692.
5 *In Re Adam* 1 Moo P. C. C. 470.
6 Ruling Cases Vol. II. p. 575.

until certain laws be established among them, the King by himself and by such judges that he shall appoint, shall judge them and their cases according to natural equity. But if the King conquers a Christian Kingdom, he may, at his pleasure, alter the laws of the kingdom, but until he does so, the ancient laws remain." The authority of this obiter dictum was much shaken by *Blankard vs. Galdy*[1] where the Court observed, "where it is said in *Calvin's case* that the laws of a conquered country do immediately cease that may be true of laws for religion, but it seems otherwise of laws touching the government", and further it was held that "in the case of an infidel country obtained by conquest, the laws do not entirely cease, but only such as are against the law of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity". In *Campbell vs Hall*,[2] Lord Mansfield observed that the "absurd exceptions as to pagans mentioned in *Calvin's case*" arose "from the mad enthusiasm of the crusaders" and held that "the laws of a conquered country continue in force until they are altered by the conqueror" irrespective, obviously, of the country being Christian or otherwise. A modern statement of the law on the subject was made by Lord Blackburn[3] in 1868: "When a colony is acquired by conquest, and when it has a foreign law in force—I believe there is no doubt that the Crown has an option; and one of its powers in such a case is either to leave the law which was in force in the country at that time still in force—or to change that law, to abolish it and to substitute the English law."

The case of India, so far as the application of English law is concerned, is complicated by the presence of all the factors which have been considered separately above. The English first came into the country as traders and established colonies. Later on they acquired the sovereignty of the country partly by conquest, partly by cession. They found in the country two organised systems of law, which were based respectively on two great non-Christian religions. Such systems of law were evidently unsuitable to them. But the King did not and possibly could not exercise his prerogative powers of abolishing them.

1 (1693) 2 Salk 411
2 (1774) 20 State Trials p. 239.
3 *R vs Eyre.* Quoted in Forsyth's "Cases and Opinions". pp 15-16. The American law to the same effect was laid down by Marshall C.J. in *United States vs. Percheman* 7. Pet 51.

It was not till the victories of Plassey (1757) and Buxar (1764) had been won that the East India Company started on its career as a territorial power, and was faced with the problem of administration of law to a large Indian population For a century and a half it had carried on its trade in the country with headquarters at "factories". Within these "factories" English law had been introduced under the charters granted by the King and was applicable to Britishers and Indians alike.[1] The position was thus described by Lord Kingsdown[2]: "The first settlement in India was made by a few foreigners in a very populous and highly civilised country, under the government of a powerful Mohammadan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.....They retained their own laws for their own government in their Factories, which they were permitted by the ruling powers in India to establish." But soon after the accession of political power to the Company came the decision of *Campbell vs. Hall* The doctrine laid down therein would have led, if followed to the logical conclusion, according to the Law Commissioners of 1833,[3] to the continuance of the Muhummadan Law throughout the province inclusive of the Presidency town of Calcutta. But the judges of the Supreme Court held English law applicable to Calcutta because of the passing of the Regulating Act of 1773 which represented the exercise of the legislative power by the new sovereign, the personal law being made applicable to Hindus and Muhummadans in certain matters by the Declaratory Act of 1781. For the rest of the province Regulations made by the Government in pursuance of various Parliamentary Acts superseded Muhummadan Law as *lex loci*. But the difference between the Presidency town and the Mofussil persisted for a long time. It was stated in *In re Maharani of Lahore*[4] that "the English law as to liberty does prevail in Calcutta as to all its inhabitants Beyond the local limits of Calcutta, the English law on the subject is

1 *Bhoomimani Dasi vs. Notobar Biswas* (1901) 5 C.W.N. 659 at pp 662-63. *Advocate-General of Bengal vs. Ranee Surnomoyee* 9 Moo I.A 387 at pp.426-27.

2 *A G. of Bengal vs. Ranee Surnomoyee* 9 Moo I.A. 387 at pp. 424-5.

3 Report of Law Commissioners.

4 (1848) 2 Ind. Dec. (o.s.) 256

the personal law of a class viz. British subjects[1] which they carry with them. The common law of England has been introduced in Calcutta with the general body of English law". In 1853, the Law Commissioners noted that "the whole difference in the state of law at the capitals and the state of law in the provinces is very great"

By the Charter Act of 1833 an all-India Legislature was established with powers to frame laws "for all persons, for all courts and for all places and things". The exercise of this legislative power gradually wore down the above noted differences in state of law. In 1927, Rankin C J.[2] said. "If in 1924 any ingenious inhabitant of Calcutta asked himself 'how is it that I am not liable to be arrested and imprisoned save by due process of law and after access to the courts of the country, the answer I conceive would have made no reference to the Magna Charta. The answer would have been that there is no warrant for any such process in the Code of Criminal Procedure and many safeguards in the Code of Criminal Procedure to protect against it. It does not matter whether one is an inhabitant of Calcutta or the comparatively unhappy inhabitant of Alipur (i.e. the mofussil), one's rights in this matter have been reclaimed from the old law introduced from England and they form part of the great statutory common law of India which has now no special application to the city of Calcutta .... . These are matters which were at one time controlled not by Act of Parliament but by the power which determined to regulate itself by certain Acts of Parliament They have been. . . .. taken under control by the legislature of India and from a lawyer's point of view the rights of the subject depend upon that Code of law which is now common law throughout the country, . that Code enshrines the old principles (of the Magna Charta and the Petition of Right) .. . I do not admit it a sound proposition of present day law that a citizen of Calcutta who goes to the Mofussil is, for any purpose of the criminal law, in a different position, if he be an Indian, from any other Indian whom he meets."

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1 Meaning European British subjects See *Beyant Singh vs Charles Reed* reprinted in Indian Decisions (O.S) Vol.3 page 792. In the consolidating Government of India Act (1915) the words "European British subject" were substituted for the words "British subject" e g. See 111, used in the previous Acts

2 *Girindranath Banerji vs. Birendra Nath Pal*, (1927) 31 C. W. N. 593 at p. 611.

CHAPTER II

The Principle of Rule of Law.

(A)—Dicey's Propositions

In the preceding chapter we have seen that there is no Fundamental Law in India, like the first ten amendments in the American Constitution, guaranteeing the subject's rights and liberties and that these are to be determined with reference to the "great statutory common law of India." This irresistibly recalls to one's mind Dicey's enunciation of the constitutional principle of Rule of Law: "each man's individual rights are far less the result of our constitution than the basis on which that constitution is founded."[1] And we are led to the enquiry: How far that constitutional principle of rule of law operates in India?

In his *Law of the Constitution*[2] Dicey gave the classical exposition of this constitutional principle. Summarising his analysis, he said[3]: "That 'rule of law,' then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three points of view.

"It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the government. Englismen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.

"It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals..

"The 'rule of law', lastly,may be used as a formula for expressing the fact that with us the law of the constitution,

1 Law of the Constitution –8th Edn. p. xxvii
2 Chapter IV and the following chapters
3 Pp. 202-3. 9th. edn.

the rules, which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land."

Dicey's conception of the rule of law, especially in its application to details, has been assailed by writers on constitutional law[1] in this century. It has been pointed out that Dicey was dealing with common law or judge-made law to the almost total exclusion of statute law, which was even in his own time growing ominously in volume and which to-day regulates the activities of the subject to a degree which could not have been dreamt of by the great fathers of common law. The doctrine of *laissez faire*, with its insistence on the utmost liberty of the individual,has given way to the socialistic policy of the control of the individual in the interests of the community. The executive to-day takes its discretionary powers from the law, and, within limits, it can get from Parliament any legislation it wants by the Cabinet's control of the majority in the House of Commons England possesses to-day a volume of administrative law which can bear fair comparison with the *droit administratif* of France It is not true that there is equality before the law to the degree that Dicey emphasised. The immunities of the Crown from the processes of the courts are enjoyed by the central departments of the Government and the Committee on Ministers' Powers considered that the constitutional critics were justified in contending that under the rule of law in England the remedy of the subject against the Administration is less complete than the remedy of subject against subject.

It in England exceptions to rules enunciated by Dicey are many, the number is far greater in India Indeed from one point of view it may be argued that there is no rule of law in India in the sense in which Dicey used the expression. If there is a great statutory common law of India, there are also so many laws curtailing the subject's rights and liberties, that in the first edition of Halsbury's *Laws of England* a special section was devoted[2] to 'Repressive Legislation'

1 See (1) Jennings's "Law and the Constitution". (2) Allen's "Law in the Making".

2 Vol. 10 pp. 620-1.

in the part dealing with the Constitution of India Judged from this angle, "ordinary law" within Dicey's meaning may be said to be non-existent. Then Dicey emphasised the intimate connection between rule of law and sovereignty of Parliament. Referring to Act of Indemnity, which legalises illegalities, he emphasised that it was itself a law. And went on to observe[1]. "It is no doubt an exercise of arbitrary sovereign power; but where the legal sovereign is a Parliamentary assembly, even acts of state assume the form of regular legislation, and the fact of itself maintains in no small degree the real, no less than the apparent, supremacy of law." Dr. Wade, the editor of the ninth edition of the classic, states[2]: "The effective safeguard lies in the presence of an elected House of Commons where the right of His Majesty's Opposition to criticise, to question and to oppose is jealously preserved". In India the executive had the most complete control of the legislature till lately, and retains under the present constitution tremendous powers of directly legislating itself. Again, even if it is conceded that there are "ordinary courts" in the same way as there is "ordinary law", special courts,like special laws, intrude much too unpleasantly on the attention of the student of constitutional law of India.

But Dicey did not confine himself entirely to the three propositions quoted earlier in his exposition of the rule of law. Any one reading his lectures cannot but feel that he attempted to give expression to something more than was conveyed by these propositions. This something more does not lend itself to exact definition. It can best be rendered in terms of feeling—the feeling that one gets by contrasting the English polity with some of the continental polities, or by contrasting the conditions obtaining in some of the Indian States with those obtaining in the rest of India. Perhaps the Ogpu and the Gestapo are legal bodies and operate under the law; perhaps it is the law in the Indian State that the will or the whim of the Ruler is the law. But one feels that the rule of law is not there, though most probably there is law. Rule of law is something else. Dicey attempted to give concrete shape to this feeling by such expressions, vague in themselves, as the following: "general tendency of the law",[3] "the legal spirit of our institu-

1. p. 257.
2. p. 547.
3. p. 268.

tions"[1] "the legal habits of Englishmen".[2] He referred to the "vague but noticeable national trait."[3] Keith[4] emphasises this aspect of the question in his defence of Dicey against the critics. He says. "The spirit of British law utterly repudiates the state of affairs which prevails in Germany today, where the executive is armed with the absolute power over the lives and fortunes of citizens and can, without any possibility of judicial control, arrest them, place them in concentration camps, and there procure their death. These acts are no doubt legal under the authority conceded by the legislature to the executive, and the system by which nothing can appear in the press which is not approved by the executive is equally legal, and it is equally legal that any assembly of citizens to criticise the executive is criminal. But the term 'rule of law' has no meaning in such circumstances". After stating that British rights resting on fundamental legal conceptions have a more abiding value than the rights given by the Weimar constitution, he proceeds: "The term 'rule of law' has therefore a fundamental meaning which is that given to it by Professor Dicey. It negatives autocracy whether Fascist or Communist; it negatives the assumption into the hands of the executive of wide and arbitrary powers; it assumes the existence of democratic control of a system which works through an impartial law, and it explains the security of the rights of British subjects."

This fundamental meaning of rule of law, if it cannot be accurately defined, can at least be illustratively described. It is within the competence of Parliament to arm the executive with the utmost powers. It has since the Reforms of 1832 given to the executive a steadily widening field of statutory discretion. But it has acted in doing so within certain limitations, vague and undefined, though none the less very real These limitations are set by the principles laid down in the great constitutional charters, "the ancient landmarks which Dicey so lovingly tendered, the Magna Carta and the Bill of Rights and the victories for personal liberty and freedom of discussion."[5] Speaking at the Columbia University, while London was still under the German blitz, Sir Cecil Thomas Carr[6] recalled Pollock's remark that all

1. p 283.
2. p. 267
3. p 187
4. Keith's "Constitution of England from Queen Victoria to George VI" pp 377-80.
5. Sir C.T. Carr's "Concerning Administrative Law" p.22.
6. Ibid pp 15-16.

party majorities in Parliament become minorities sooner or later, and pointed out that one of the surest ways in which any Government can hasten that process is to acquire a reputation for arbitrary interference with ordinary rights. In pointing out the concern of the House of Commons where the liberties of the subject are involved, he referred to the appointment of a Royal Commission to review the whole subject of police powers and procedure following a debate in 1928 over an incident in which the police was alleged to have committed a blunder. In times of emergency Parliament makes a voluntary surrender of the subject's liberties to the executive but it continues to keep a vigilant and unceasing watch on the exercise by the executive of the powers so surrendered.

And when such a surrender does take place or when the executive is given discretion by statute, the courts of law see to it that the executive does not go beyond the powers given to it by Parliament. An impartial and independent judiciary is the bulwark of the subject's rights and liberties. Dicey spoke exultantly about the "noble energy with which the the judges have maintained the regular rule of law".[1] He thought that the "the judges, rather than the Government, represented the august dignity of the State or in accordance with the terminology of English Law, the Crown "[2] It was because the United States had an equally independent and impartial judiciary, in addition to the fundamental guarantees of the citizens' liberties in the Constitution, that he considered that "the rule of law is as marked a feature of the United States as of England."[3]

What are these courts of law? Throughout his lectures Dicey puts as much emphasis on 'ordinary courts" as on "ordinary law". This emphasis can be better understood in the background of the struggle for constitutional liberty in England. One of the main objectives of this struggle was the abolition of the special courts which were created or whose jurisdictions were extended by virtue of the Royal Prerogative. We find Dicey's formula in the Star Chamber Abolition Act which received Royal assent on 5th July 1641, more than three centuries ago. It insisted on trial "in the ordinary courts of justice and by the ordinary course of the law". So opposed is the creation of special courts to English tradition, that though the Second Word War emergency

1 Law of the Constitution p. 293.
2 Ibid. p. 394.
3 Ibid. p, 200.

legislation authorised the setting up of such courts, even then the Government thought it expedient to get Parliamentary sanction before actually bringing them into existence. And to the ordinary courts subject's access should be unimpeded. The Committee on Ministers' Powers in their report stated that "any encroachment on the jurisdiction of the Courts and any restriction on the subject's unimpeded access to them are bound to jeopardise his rights to a much greater degree than would be the case in a country like the United States where they are protected by the express terms of a written constitution."

(B)—Introduction of Rule of Law in India.

In its fundamental meaning, if not in the details of its operation in England, the principle of rule of law, it is submitted, does prevail in this country. Legal habits of the people, their being thoroughly imbued with legal ideas—these are the foundations of the stately edifice of rule of law. The Americans received them as a legacy from England, the mother-country. The Indians have imbibed them from the close and intimate connection with England for nearly two centuries. That "the all-pervading presence of law is the sole source of governmental powers and duties"[1] is as true of India as of England. In India, as in England, it is almost axiomatic that the existence or non-existence of a power or duty is a matter of law and not of fact, that the argument of State necessity is not sufficient to establish the existence of a power or duty, that it is for the courts to determine, whether or not a particular power or duty exists and to define its ambit, and that the subject has a general right of access to the courts.

The East India Company came into existence on the 31st of December 1600 and Parliament intervened in Indian affairs for the first time in 1773 when the Regulating Act was passed. In between these dates—a period of a century and three quarters—the great struggle for English liberties took place, and the constitutional principles were finally settled. TheAct of 1773, defective, incomplete and unsatisfactory in many ways, is based on those principles Not that Parliament consciously applied those principles to this then distant land, but that Parliament in legislating could not think of doing otherwise. The Government of India was given a

1 Halsbury 2nd edn. Vol. VI p. 379.

legal basis by this historic enactment. Its powers henceforth were to be derived from law, its constitution was to be a matter of law. The all-pervading presence of law was henceforth to be the source of powers and duties of the executive in India. And to complete the picture, an independent judiciary was created in the Supreme Court. Distrust of the executive, which was characteristic of the period, can be seen in the provision about the necessity for registering the legislations in the Court before they could take effect as law. Soon the Supreme Court was vigorously exercising its power and solemnly hearing objections and deciding them before it would register any regulation.[1]

The Regulating Act was not the outcome of any logical plan. It certainly did not originate in any crusading zeal for constitutional liberties. Perhaps it never crossed the minds of the framers of the Act that they were introducing the rule of law in India. Dicey begins his dissertation on Rule of Law by calling attention to the two features that have at all times since the Norman conquest characterised the political institutions of England. The first is the omnipotence or undisputed supremacy throughout the whole country of the Central Government and the second is the supremacy of the law. The Act introduced both these features in the Indian political institutions. The effects of the Act were momentous and it befittingly stands at the threshold of modern Indian history.

(C)—Applicability of Dicey's Propositions to India.

Is the Indian law of the same character as the English law? Are the Indian Courts ordinary courts in Dicey's sense? These are the further two questions to which we have to seek an answer.

It has already been observed that upto 1921, the executive had complete control over legislation. And it passed a number of legislations which severely restricted the rights and liberties of the subject in several directions. These legislations oftentimes excited violent passions. One of the foremost of Indian jurists described them as "law-less laws.". This description by itself was a tribute to the other legislations on the statute-book, by far the greater number, as lawful laws. That this description was given and that it stuck shows the extent to which the Indian people had been permeated with legal ideas and had acquired legal habits.

1 *In re Ameer Khan* (1870) 6 B L. R, 392 at p. 453.

But the point to be noted is that each time the all-powerful executive brought forward such "lawless" legislations it sought to justify them as exceptional. Very often they were in the beginning temporary in duration and professedly designed to meet an unforeseen emergency. The executive thereby recognised the vague, but none the less real, limitations set by the principles of the great constitutional charters and were apologetic for going beyond them. And when India had something like the beginnings of a real legislature in 1921, the elected representatives of the people got committees to examine these repressive legislations, and acting on their reports,[1] a number of them were removed from the statute book in 1922. This was a fine proof of the legal-mindedness of the people on the one hand and a handsome recognition by the executive of the constitutional limitations on their powers on the other.

What made the "lawful" laws lawful? The answer is that they owed their inspiration to the Common Law, which is, in the words of Dicey,[2] "the most legal system of law in the world." India has not got an immemorial common law to which the Statute can be regarded as an interloper. Legislation has given to the country its "great statutory common law", and its people their "common-law rights"[3] It has further provided for the machinery through which those rights can be enforced.

It is not necessary to trace the history of Indian legislation in detail. Warren Hastings was the author of the first set of regulations framed even before the passing of the Regulating Act 1773, presumably in the exercise of the general powers of Government. The Declaratory Act of 1781 gave to the Governments in India the power to frame regulations, and Lord Cornwallis, the father of India's legal system, made a complete code of laws. To understand the spirit in which this task of legislation was undertaken we have to listen to the words of Sir John Shore, a friend and a colleague of Lord Cornwallis. Referring to the need for controlling the revenue officers, he said: "Removed from the control of our own government the distance of half the globe, every practical restriction should be imposed upon the administration in India, without circumscribing its necessary powers, and the

1 The Reports are printed as appendices to "India in 1921-22".
2 p. 180.
3 Indian Law reports teem with references to "common law rights", e g. Batty and Russell JJ. in *Balwant Ramchandra vs. Secretary of State* (1905) 29 Bom. 480 at p. 504.

property of the inhabitants be secured against the fluctuation of caprice or the license of unrestrained control."

The Charter Act of 1833 for the first time created a law-making body for India, separate from the executive government, with the avowed purpose of putting the legal system in India on a stable basis. It provided for the appointment of the Indian Law Commission to devise suitable legislative measures. Macaulay was the most prominent member of this Commission. Its reports contain a mine of information and learning, which in Ilbert's words, has not been properly worked so far. Its labours led to the enactment of "the criminal law and the law of civil and criminal procedure, based wholly on English principles."[1] "The Acts of the Indian Legislature were framed with constant reference to the rules recognised in England."[2]

Very recently, while dealing with the argument for the Crown 'apparently in the strain of Rex is Lex', a High Court Judge[3] has said: "There is indeed no common law of India, but it cannot be gainsaid that most of the essential rights derived from the Common Law of England have been recognised in India and incorporated into her laws.....The rights of personal freedom, protection of one's life and limb and of one's good name are as well recognised (though nowhere defined) in India as in England.....There is unquestionably the rule of law in India in the sense in which Dicey interprets that expression in his well known Law of the Constitution". His Lordship further referred to "the mighty legal system which was built up brick by brick in India by generations of British lawyers, who, true to their genius, framed laws in the Indian Council and interpreted and applied them in the Indian Courts."

Now about courts. From the very nature of things we have not got courts which trace their origin from hoary antiquity. But that is not to say that in India there are no "ordinary" courts. Throughout India there is a hierarchy of criminal courts, whose constitution is provided for in the Criminal Procedure Code, and another hierarchy of civil courts, mostly regulated by provincial Acts. The High Courts stand above them, with wide powers of appeal and revision over the subordinate courts. These are the ordinary courts.

1 Ilbert's "Government of India" p. 367.
2 Per West J in *Ganpat Putya vs Collector of Kanara* (1875) 1 Bom7.
3 Per Niyogi J. in *Sitao Jholia vs Emperor* A. I. R 1943 Nagpur 36 at pp. 41-2.

There have been special courts as there have been special laws, for the same reasons and sought to be justified with the same apologies. But both have been exceptions to the ordinary law and the ordinary courts, too many, too frequent, and oftentimes too drastic, but all the same, exceptions.

Special laws and special courts have been the haphazard growth which have obscured our vision of the ancient and stately edifice of the Rule of Law standing behind them. As this growth has been progressively cleared, the edifice has come more clearly and more prominently in view.

CHAPTER III

The Supremacy of The Law.

(A)—Statutory basis of Indian Government.

From the beginning of its connection with India the British Crown has been the constitutional Crown. By the time George the Third gave his royal assent to the first parliamentary enactment[1] relating to the government of territories in India, the theory of Divine right had been buried and Crown placed definitely under the law. The Parliament and the Courts had won their way to a position of predominance in the constitution. The Crown had been presented to William and Mary along with a Declaration of Rights, which had been enacted as a parliamentary statute as the Bill of Rights. This had been followed a few years afterwards by the Act of settlement. These Charters had condemned certain claims or practices on the part of the Crown and pronounced them illegal.

Just before the Regulating Act was passed, the Commons had agreed to the resolution "that all acquisitions, made under the influence of a military force or by treating with foreign princes, do of right belong to the State."[2] A few months later the principle received judicial recognition in *Campbell vs. Hall.*[3] This case laid it down that the State meant the constitutional Crown. Lord Mansfield said: "There cannot exist any power in the King exclusive of Parliament" and "that a country conquered by the British arms become a dominion of the King in the right of his Crown, and therefore necessarily subject to the legislative power of the Parliament of Great Britain."

But for long years after the Act of 1773 was passed, the Crown's sovereignty over the territories governed by the East India Company was vague and indefinite. The Company, if they were British subjects, were also subjects of the Great Moghul. The Privy Council noted in *Mayor of Lyons's Case*[4] that "the company's sovereignty was gradually ac-

1 Regulating Act, 1773.
2 Auber's "Constitution of the East India Company" p. 512.
3 (1774) 20 St Tr. 304
4 *Mayor of Lyons vs East India Company* (1836) 1. M.I A. 175 at p. 275.

quired, that the transition of the Company from the state of subjects under the Moghul to an independent authority, was slowly made, by imperceptible degrees." Their Lordships said : "At what precise time and by what steps, they exchanged the character of subjects for that of sovereign, or rather acquired by themselves, or with the help of the Crown, and for the Crown, the rights of the sovereignty, cannot be ascertained." It had been argued before the Board that the Moghul Emperor's grant of *diwani* to the Company in 1763 was the foundation of all sovereign rights they exercised, that the grant could never be considered as passing an independent sovereignty, for it was derived from, and was at that day (1836) subordinate to the Great Moghul. It was further pointed out that the coinage was to that day issued in his name. As a matter of fact, the King of Delhi retained to the last undefined but real attributes of sovereignty.[1]

Whatever might have been the source from which the Company derived its authority, all the territories and the rights of the Company were vested in the Crown, to be exercised in its name, by the Government of India Act 1858. The Crown's sovereignty became precise and clear beyond all doubt. The same statute vested in the Governor-General in Council the superintendence, direction and control of the civil and military government of India.

When it was necessary to provide for the devolution of powers from the Central Government to the Provincial Government and to divide the powers of the Provincial Government between reserved and transferred fields, it was done by a parliamentary statute, the Government of India Act, 1919.

Section 2 of the present Constitution Act recognises the King as the sovereign of all authority. All rights, authority and jurisdiction, which appertain or are incidental to the Government of territories in India, are in the first instance, vested in the King and then distributed by the Constitution Act among the various authorities created by it. The residue that is left is exerciseable by His Majesty or as directed by His Majesty.

So all authorities concerned with the governance of India have got a statutory basis, and their rights, authority and jurisdiction are of statutory origin. But what are the conditions for the exercise of the residue of the rights, authority and jurisdiction vested in the King? This brings us to the question of the Prerogative in India.

1 *Raja Saligram vs. Secretary of State* (1872) 18 W.R. 389 (P C.)

(B)—The Prerogative in India.

Prerogative in England is that part of the Common Law which relates exclusively to the King.[1] Dicey defined it as "historically and as a matter of actual fact nothing else than the residue of discretionary authority, which at any time is legally left in the hands of the Crown". Dr. Wade,[2] the editor of the ninth edition of his book, notes that modern government is a matter largely of statutory power but that "the prerogative predominates in the fields of foreign affairs, patronage, disposition of the armed forces, and of course, in the summoning and dissolution of Parliament.". The Bill of Rights established the authority of Parliament to limit and define the Prerogative, and thereafter it became a normal part of common law, definable and determinable by the Courts.[3]

We have seen that the Common Law of England is not per se operative in India outside the Presidency towns. But from 1833 Parliamentary legislation has proceeded on the assumption that prerogative does obtain in India. The Charter Act of that year expressly reserved royal prerogatives as matters which the Legislative Council of the Governor-General was not competent to affect by legislation. But the Charter Act of 1853 withdrew this, reservation but provided for previous sanction of the Crown to legislation, affecting the prerogative. Forsyth[4] recalls the interesting incident when an Indian Patent Act (VI of 1856) had to be repealed as being a legislation affecting prerogative matter. The present Constitution Act by Sec 110, prohibits legislation derogating from any prerogative right of his Majesty to grant special leave to appeal from any court except in so far as is expressly permitted by the Act itself.[5] The Constitution Act, thus, recognises that prerogative in India is a matter of law and can be affected, within prescribed limitations, by Indian legislation like any other law.

The Privy Council decision in the *Mayor of Lyons's Case*,[6] in which the question was whether the Crown's Prerogative with respect to aliens obtained in India, is the leading autho-

1 Halsbury (2nd edn) Vol VI p. 381.
2 "Law of the Constitution," (9th edn) p 469 (note) and p. 485.
3 See Keith "Constitution from 1840 to 1940" Vol I p.4.
4 "Cases and Opinions" p 32.
5 That is in relation to the extension of the appellate powers of the Federal Court under Sec 206.
6 *The Mayor of Lyons vs. The East India Company* (1837) 1 M.I.A. 175.

rity for the proposition that a question of prerogative is, and has always been, examinable by the Courts in India. The appeal came up before the Privy Council in 1836, after the passing of the Charter Act of 1833. But it related to a cause of action that had accrued in 1817 and the Prerogative question had been dealt with by the Indian Court long before the passing of the Act.

The extent of the Prerogative in England is obscure, and the process of elucidation has been continuous, though far from elucidating all the questions which may arise.[1] The position in India may be stated in the words of Bhasyam Ayyanger J.[2] as follows: "It is unnecessary to refer to various other instances which will readily occur to one's mind which according to the Common Law of England are comprised in the royal prerogative, but in the very nature of things are either inapplicable or have not been introduced in India. On the other hand, it is probably true that the Crown has, according to the Common Law of India, certain prerogatives which it may exercise in India though not in England, notably the prerogative of imposing by an executive act assessment on lands and varying the same from time to time. The prerogatives of the Crown in India— a country in which the title of the British Crown is of a very mixed character—may vary in different provinces as also in the Presidency towns as distinguished from the Mofussil The determination, with anything like legal precision, of all the prerogatives of the British Crown in India is by no means an easy task." The Allahabad High Court[3] dealing with a question of cession said: "Whatever be the prerogative of cession enjoyed by the Crown in other of its dominions it is not certainly not more restricted in India"

Whatever its extent, the Prerogative is limited in England by the four great statutes or charters, by which the

1 Keith "Constitution from 1840 to 1940" Vol. I. p 5,

2 *Bell vs. Madras Commissioners* (1902) 25 Mad. 457 at p. 482.

3 *Lachmi Narain vs. Raja Pratap Singh* (1878) 2 All. 1. That the prerogative, unless validly limited by law, is as extensive in a colony as in Great Britain, has been held by Canadian and Australian Courts —

(i) *Queen vs. Bank of Nova Scotia* (1885) 11 S C R. 1 at p. 17,
(ii) *A.G. Canada vs. A.G. Ontario* (1894) 28 S C.R. 458 at p. 468.
(iii) *King vs. Sutton* (1908) 5. C.L.R. 789.
(iv) *N.W.W. vs. Collector of Customs* (1908) 5 C.L.R. 818.
(v) *The King vs. Kidman* (1919) 20 C.L.R. p. 425, per. Griffiths C.J. at pp. 435-36.

rights and liberties of the subject are preserved and acts of tyranny by the Crown or its ministers restrained.[1] It is submitted that since the Prerogative in India is the Prerogative of the British Crown, extended to India as an inseparable adjunct to sovereignty,[2] it is subject to the same limitations. A Full Bench of Allahabad High Court, consisting of five judges, in considering the question of the Prerogative of appointments on the High Court Bench referred to "the policy pursued by Parliament since the Act of Settlement became law, a policy which has secured to the subjects in England protection against unlawful or unauthorized acts of the Executive".[3] Their Lordships went back to the Magna Carta to find a statement of the fundamental principles of justice.[4]

We now come to the question of the exercise of the Royal Prerogative in actual practice. In England constitutional advice is tendered by the heads of the various ministerial or political departments in minor matters and collectively by the Cabinet in more important matters[5] In the Dominions and colonies Prerogative power is exercised according to the constitutional practice obtaining in the colony.[6] As regards India, in a case[7] arising under the old Constitution Act, Lord Selbourne asked during arguments before the Privy Council the following suggestive question: "So far as we know the thing was done by the Governor-General in Council with the assent of the Secretary of State which implies, prima facie, the assent of the Crown. Are we not bound on these facts to consider that the assent of the Secretary of State was the assent of the Crown, and that whatever power the Crown had, from whatever source derived, it might be exercised in that manner ?". This opinion was cited as an authorrty and followed two years later in an Allahabad case[8] heard on the extra-ordinary original side of the High Court by three judges. Their

1 Halsbury (2nd edn) Vol. VI, p. 450.
2 *Mayor of Lyons's Case* (1837) 1 M,I.A at pp. 281-82
3 *Q. E. vs. Ganga Ram* (1894)16 All. 136 at p. 150
4 Ibid p. 149.
5 Halsbury. (2nd edn.) Vol. VI. p. 459.
6 *Commercial Cable vs. Newfoundland* (1916) A. C. 610.
7 *Damodar Gordha vs. Deoram Kanji* (1876) 1 Bom, 367 at p. 384. This case proceeded on the wrong assumption that the ceded territory was British territory. See *Devchand vs. Chottam Lal* (1905) 33 Cal. 219 (P. C.)
8 *Lachmi Narain vs. Raja Pratap Singh* (1878) 2 All 1 at p. 33.

Lordships said: "The prerogative of the Crown is exercised with the advice and through the agency of the responsible ministers of the Crown. In the case before us it is shown that the cession of the territory to His Highness the Nawab of Rampur was effected by the Government of India, that it was accepted by the Secretary of State as fulfilling instructions conveyed to the Government of India, and that it was approved by Her Majesty's Government. We have then sufficient evidence of a cession by the Crown; and when it is proved that a cession has been so made, it is not for this Court to enquire whether in the particular instance the exercise of the prerogative was called for." In *Khembo's* case it was held that even subsequent ratification by the Secretary of State, as by defending the suit, was enough.[1]

It is submitted that the principle of the above decisions is to be applied with caution in determining the validity of the exercise of the prerogative under the conditions of the present Constitution Act. So far as the residuary authority under Section 2 of the Act is concerned, the Prerogative is to be exercised on the advice of the constitutional advisers of the Crown in England, the Secretary of State for India, the Prime Minister or the Cabinet as the case may be. For instance, conduct of foreign affairs undoubtedly falls within this residue. The war with Germany was declared in 1939 without reference to India.

But the use of Prerogative in the exercise of executive authority either by the Governor-General (when the Federation comes) or the Governor, on the advice of the Ministers, does not, it is submitted, require the sanction of the Secretary of State. The old Constitution Act provided for a unitary constitution. The terms in which the government was vested in the Governor-General in Council were, as we have seen, wide and sweeping, and so were the terms of Sec.2 (2) conferring powers on the Secretary of State with respect to the Government of India. But the basis of the present constitution is federal, the provinces and the Federation being vested with separate jurisdictions by the Constitution Act. The provinces no longer get their power by delegation or devolution from the Central Government as they did under the old Constitution. It follows, therefore, it is submitted, that where executive authority can be exercised by the Federal or Provincial Government without control by the Secretary of State, that Government can validly make use of the Royal Prerogative without

1 *Khembo vs. Secretary of State* 105 P. R. 1908.

the sanction of the Secretary of State.[1] Executive functions are incapable of comprehensive definition for they are merely the residue of the functions of the government after legislative and judicial functions have been taken away.[1] Executive acts, in the United Kingdom, are concerned with either the administration of parliamentary enactments and the rules and regulations made thereunder, or with the exercise of discretionary authority which is placed in the hands of sovereign by virtue of the common law without any express parliametary sanction or supervision.[2]

The Constitution Act of India divides the legislative powers between central and provincial fields. There is a concurrent field in which both the Centre and the provinces (the latter with some restrictions) operate. Then it is laid down (Sec. 49(2)) that the executive authority of the province extends to the matters with respect to which the provincial legislature has power to make laws. Similarly the executive authority of the Centre has been made co-terminous with its legislative jurisdiction (Sec. 312(2)) with certain additions. The Central Government does not to-day possess the powers of paramountcy over the Indian States, the functions of the Crown in relation to the Indian States being now exerciseable by His Majesty's Representative under Section 2(1) of the Constitution Act.

Within its appointed field the executive authority, whether of the Province or of the Centre,is as wide and plenary in character, as is its legislative power. It has been held by the Federal Court that the principle underlying the distribution of legislative powers in India is substantially the same in India as in Canada.[4] It is submitted that the Canadian precedent has also been followed in the Indian Constitution Act in the matter of allocation of executive authority between the units and the Federation. About the Canadian Constitution Act, the Privy Council has observed[5] : "The effect of these sections of the British North America Act is that, subject to certain

1 This is a broad statement It does not take into account the exceptional cases of control by the Secretary of State of the Governor-General's or Governor's actions,provided for by the Constitution Act nor the case of the Central Government during the transitional period. It is confined to the exercise of executive authority on ministerial advice.
2 Halsbury (2nd edn,) Vol. VI. p 385.
3 Ibid p. 459
4 *Subrahmanyam vs. Muttuswami* 1940 F,C R. 188 at p 236.
5 *Bonanza Creek Gold Mining Co. vs. Rex* 1916 A.C. 565 at pp. 579-580.

express provisions in that Act and to the supreme authority of the Sovereign, who delegates to the Governor-General and through his instrumentality to the Governors, the exercise of the prerogative on terms defined in their commissions, the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers." And about the executive authority the PrivyCouncil said[1] : "The Imperial Government might delegate those powers (to refuse to permit an alien to enter the State or to expel or deport him from the State) to the Governor or Government of one of those Colonies, either by Royal Proclamation, which has the force of a statute—*Campbell vs. Hall*—or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has given assent. If this delegation has taken place, the depositary or depositaries of the executive and legislative authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them. The following cases establish these propositions: *In re Adam* (1737) 1 Moo. P.C. 460 at pp. 472-6. *Donegani vs. Donegani* (1835) 3 Kn. 63 at p. 88 *Cameron vs. Kyte* (1835) 3. Kn. 332 at 343 *Jephson vs. Reira* (1835) 3 Kn. 130."

It should be noted that in the exercise of executive power, only Prerogative "inseparable from sovereignty" can be used and that by the Government in exercise of powers sovereignty e. g. martial law.[2] The Governor-General or the Governor as such does not exercise sovereign powers. This has been repeatedly held by the Privy Council and all the earlier authorities were reviewed in *Musgrave vs. Pulido*.[3] The preamble to the "Instructions to the Governor-General of India" refers to "certain powers, functions and authority vested in the Governor-General by the Letters Patent and the Government of India Act, 1935." By the Letters Patent, the Prerogatives of Pardon, of bestowing King's Commissions, and of Indian Honours are specifically delegated to the Governor-General. The conferment of any general sovereign powers is clearly negatived by these provisions.

(C)—Subjection of the Executive to Law.

Wide as is the scope of executive authority it is based

1 *Attorney-General of Canada vs. Cain* (1906) A.C. 542 at p. 546.
2 See observations of Beaumont C J. in A.I.R. 1931 Bom. 57.
3 (1879) 5. App. Cas. 102.

on law,[1] whether it be a statutory enactment of Parliament or the Legislature in India or the Prerogative. And, therefore, questions that arise out of its exercise are cognisable by the Courts of Law. The subject has got the inherent right of access to the Court to assert rights or enforce liabilities created or imposed by the law. Nowhere it is better illustrated than where an act of State is involved. An act of State is outside the jurisdiction of municipal courts, but whether a particular act is an act of State or not is a matter that will be determined by the Courts. In *Musgrave vs. Pulido*,[2] their Lordships, rejecting the defendant's plea, which merely stated that his acts were acts of State, said : "As far as their Lordships are aware, it will be found that in all suits brought against the Government of India, whether in this country or in India, the pleas and answers of the Government have shewn, with more or less particularity the nature and character of the acts complained of, and the grounds on which, as being political acts of the sovereign power, they were not cognisable by the courts. Not only that the facts were laid before the Courts, but that the Courts entertained jurisdiction to inquire into the nature of the acts complained of, and it was only when it was established that they bore the character of political acts of state that it was to be decided they could take no further cognisance of them." A list of cases, in which it has been held that the acts complained of were acts of State, is given below.[3]

1 In *Channappa Shantirappa vs Emperor* A I R 1931 Bom 57 at p. 62 Madgavkar J said "I should say that the normal powers of the executive in India not only equal, but far exceed the powers, with which Parliament had armed the executive during the Great War under the Defence of the Realm Act and the rules thereunder. And so long as these powers exist, we cannot, on the analogy of the English constitutional law, interfere with the exercise of these powers by the executive" This passage was apparently relied on by the Advocate-General in *Sitao Jholia* case reported as A.I.R. 1943 Nagpur 36 (see p 41 col. 2). It is submitted that though perhaps the language of the passage admitted of more clarity, Madgavkar J. did not hold that the executive was above the law. What His Lordship was referring to was the power of the Governor-General to enact ordinances and thus to legalise illegal acts of the executive by executive legislation—a power which is not available to the executive in England. The Bombay case dealt with a Martial Law Ordinance and the Nagpur case with a War Emergency Ordinance.

2 (1879) 5 App Cas. 102

3 (i) *Secretary of State vs. Kamachee Boye Saheba.* (1859) 7 M.I A. 476 (State escheated on the ground of failure of heir).

(ii) *Raja Saligram vs. Secretary of State* 2 P.R. 1872 (P C,) (Confiscation of the Jagir of the last King of Delhi, who was a sovereign power).

But there cannot be an act of State by a sovereign against its own subjects. The Privy Council has observed in a recent case[1] : "The phrase, act of State, is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning and can give no immunity from the jurisdiction of the Court to inquire into the legality of the act". In this case their Lordships called attention to some well-established principles in the following words: "The Governor acting under the Deportation Ordinance acts solely under executive powers and in no sense as a Court. As the executive he can only act in persuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive". The same principle was emphasised by the Calcutta High Court[1] in a similar instance of the extreme use of executive power under the law, namely, detention without trial under Regulation III of 1818. It was held that the act of the Governor-General in Council in causing the arrest was not an act of State and the matter was cognisable by a municipal court. And further

1 *Eshughayi vs Government of Nigeria* AI.R. 1931 P.C. 248 at p 252
2 *In re Ameer Khan* 6 B L, R. 392, at pp 435-36.

(Contd from note 3 last page)

(iii) *Sardar Bhagwan Singh rs, Secretary of State* (1874) 2 I. A. 38 (Seizure by conquest of the estate of a former chief of the Punjab).
(iv) *In re Madhave Singh* 31 I. A. 239 (Deposition of a Chief of a native State).
(v) *Secretary of State vs Wagentriber* 6 P R. 1867 (Confiscation of property in the course of suppression of rebellion of its own subjects and its subsequent restoration).
(iv) *Khembo vs. Secretary of State* 105 P.R, 1908 (Control and authority exercised by the Government of India as the paramount power over the native States)
(vii) *East India Co. vs Syed Ally* 7 M.I.A. 555 (Dealings with properties of foreign sovereigns).
(viii) *Secretary of State vs. Sardar Rustam Khan* A I R. 1941 P.C. 64 (Recognition of title to land acquired by agreement between Khan of Kalat and Government of India, being two sovereign powers).

that there was "no authority for extending the immunity from the control of municipal law which exists in regard to acts done by governors in their political capacity as regards foreign States, or in times of war, to the case of a wrong alleged to have been done in times of peace to a subject of the Crown by a person or persons exercising the office of Governor".

Where the sovereign power acts under colour of legal title, such act is not an act of State. Begam Samru, holding lands under the Maharaja of Gwalior under a particular tenure, continued to hold them under the same tenure for her life time by virtue of a treaty with the East India Company, when the Maharaja ceded territory to the Company. The resumption of the lands on the death of the Begum, upon the alleged determination of that tenure, was held by the Privy Council, over-ruling the decision of the Chief Court of the Punjab, not to be an act of State.[1] This case was distinguised from the case of *Kamachee Boye Saheba*,[2] on the ground that "the Raja of Tanjore, though he may have had less substantial power than that exercised by the Begum Samroo, retained at least the shadow of original and independent sovereignty."[3] In *Raja Saligram's Case*,[4] the Privy Council had to deal with the property of Bahadur Shah II, but on the finding that his status was that of the King and that his grandfather Shah Alam had been referred to by the then Governor-General as "Emperor", *Forrester's case* was distinguished and the rule in *Kamachee Boye Saheba's case* was applied. The act of State can only be the exercise of arbitrary power by the sovereign state, not by any individual.[5]

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1 *Forrester vs. Secretary of State* (1872) 18 W. R. 349 (P. C.).
2 (1859) 7 M I. A 476.
3 (1872) 18 W. R. 349 at p. 351.
4 *Raja Saligram vs The Secretary of State* (1872) 18 W. R 389 at pp 392-393.
5 *Collector of Kaira vs Modee Prestonjee Khoorsedji* 2 M I A 37 at p 50 (The point in issue in this case was whether the seizure of an estate by an official of the Peshwa for alleged debts due to that official was an act of State by the Peshwa's government).

CHAPTER IV

Martial Law

When martial law comes in, the rule of law is suspended and the Executive, through its military power, becomes supreme. "According to English constitutional law" observed Beaumont C. J.[1] "where a state of war, or insurrection amounting to war, exists it is competent for the Crown, in the exercise of its prerogative,[2] to place the country affected under martial law. Martial law in that sense, as has often been said, is no law at all : the ordinary courts ex hypothesi are not functioning except under military protection,[3] and the effect of martial law—in the sense in which I am now using the expression—is to substitute for the ordinary law of the land the will of the military commander The liberty, property or even the lives, of the persons in the affected area are placed at the mercy of the military. But, as by the law of England, which applies to India, the Crown is not above the law, the Crown can only declare[4] martial law, in cases of absolute necessity, and when the necessity ends normal legal conditions are automatically restored. Where martial law has been declared it is competent for the Courts —and is indeed the duty of the Courts if called upon—after the restoration of normal conditions to decide whether and to what extent martial law was justified. It is obvious that the consideration whether the facts proved constitute a state

1 *Chanappa Shantrappa vs. Emperor* A.I R. 1931 Bom. 57.

2 Cf. "Whether this power of using extraordinary measures is really a matter of the prerogative of the Crown, or whether it is merely an example of the common law right and duty of all, ruler and subject alike, to use the amount of force necessary to suppress disorder, is not quite free from doubt."—Article 619 of Vol. VI Halsbury 2nd edn. at p 530.

3 "It is doubtful whether there is any question of permission from the military authorities, for in *R (Garde) vs. Strickland* (1921) 2 I.R. 317 at p 331, Molony C.J protested that he sat in virtue of the King's commission and not by any permission of military authorities Of course, the fact that the Courts need protection in order to function is evidence of a state or war (See *R (Childers) vs Adjut-General* (1923) 1 I.R 5"—From note (m) at p. 499 of Halsbury 2nd edn. Vol VI

4 "The fact that martial law is in force is usually notified by means of proclamations where such a course is rendered necessary by a state of war" - Article 776 of Vol. VI Halsbury 2nd edn. at p. 601.

of necessity, and, if so, how long that necessity lasted, may involve difficulty, and that martial law is a somewhat dangerous weapon to use. It is no doubt, for that reason, that in the case of countries not free from the risk of foreign invasion or civil strife, it is found convenient to arm the executive in cases of emergency with a weapon more easy to control and more certain in its operation In France there is the 'state of seige'. In England there is the Defence of the Realm Act, under which during the late war the Crown had power to frame regulations necessary for the public safety and to authorise the trial and punishment by courts-martial of persons offending against such regulations. In India[1] the matter is governed by Section 72 Government of India Act of 1919".

When in 1919 the Punjab was first placed under martial law, the statutory authority invoked was Bengal State Offences Regulation of 1804. The Governor-General in Council acting under that Regulation made orders whereby, after reciting that he was satisfied that an open rebellion against the authority of the Government existed, he suspended the functions of the ordinary criminal courts as regards the trial of a specified class of persons (generally connnected with open rebellion) and established martial law; and further directed the trial by courts-martial of all such persons. But immediately after-wards Ordinance making powers of the Governor-General were resorted to and courts-martial were substituted by Commissions of three persons with legal training who were to follow court-martial procedure but whose decisions were not to be subject to confirmation by military authorities. By later Ordinances the powers of the Commissions were greatly enlarged so that ordinary judiciary practically ceased to function.

The sentences passed by these Commissions were so outrageous that in a very large number of cases, after martial law was withdrawn, they had to be drastically reduced by Government.[2] Therefore when a few years later martial law was established in Malabar to cope with the Moplah rebellion, a modified procedure was adopted. There was no order under Bengal Regulation of 1904 and the Ordinance (II of 1921) dealt comprehensively with the whole matter. No Commission was set up but ordinary magistrates were invested with

1 In 1930 when the judgment was delivered.

2 See Disorders Enquiry Committee Report p. xxxix-Para 42 of the Government of India Despatch of 3rd May 1920.

special powers. A Special Tribunal was constituted whose decisions were appealable to the High Court. The Bengal Regulation was formally repealed in 1922 and in 1930 Martial Law was introduced in Sholapur by an Ordinance (IV of 1930).

Since the days of the Stuarts there has been no occasion for the Courts to deal with a case arising out of administration of martial law in England. Dicey in the eighth edition of his classic,[1] quotes the following statement of Sir James Mackintosh as stating with truth, if not with precise accuracy of legal argument, limits within which martial law is justifiable: "The only principle on which the law of England tolerates what it called martial law is necessity; its introduction can be justified only by necessity; its continuance requires precisely the same justification of necessity; and if it survives the necessity on which alone it rests by a single minute, it becomes instantly a mere exercise of lawless violence. When foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitutes for them, and to employ for this purpose the military, which is the only remaining force in the community. While the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society; but no longer".

In India, where martial law is introduced and withdrawn under statutory authority, examination of the question of necessity as a question of fact becomes superfluous. But since the statute is an Ordinance, which is legislation by the executive, what really happens is that judgment of the Court on the question of necessity is substituted by the statutorily unchallengeable judgment of the Executive. This is not a happy state of affairs but it becomes worse when authoritative opinion on the question is divided and divided on racial lines. This has happened in the case of the Punjab Martial Law as well as Sholapur Martial Law. The majority in the Enquiry Committee appointed to enquire into the Punjab disturbances expressed their view[2] that it was "not straining language or exaggerating fact to describe as open rebellion the forms of violence and outrage that were present" precedent to the formal introduction of

1 p. 541.
2 Disorders Enquiry Committee Report p. 111.

martial law. The minority reached the conclusion[1] that "the situation was well in hand and in our view there was no imperative necessity of superseding the civil authority who could have effectively carried on with the aid, if necessary, of the military, if any sudden emergency arose", and further "if our view is correct that it was not necessary to introduce martial law..., it will follow that its continuance for the period it was continued was still less justifiable". In the case[2] that went up to the Bombay High Court arising out of administration of martial law in Sholapur, Madgavkar J.[3] expressed himself as "not satisfied on the point why military aid alone did not suffice without handing over of charge by the civil authorities to the military which in law makes all the difference". But Blackwell J. said: "If it had been necessary to decide the question, I should myself have had no hesitation in holding that the civil authorities were justified in handing over control to the military." Beaumont C.J[5] did not think it necessary to determine whether the declaration of martial law was justified.

In *Ex Parte D.F. Marais*[6] the Privy Council said: "Their Lordships are of opinion that where actual war is raging acts done by military authorities are not justiciable by the ordinary tribunals. No doubt has ever existed that where war actually prevails the ordinary courts have no jurisdiction over the action of the military authorities." Though the decision has been followed in several Irish[7] cases, the statement of law has been severely criticised by eminent British jurists. Dicey says[8] "The very width of the language warns us that it must be limited to the circumstances of the particular case. It does not necessarily assert more, and as regards transactions taking place in England, cannot be taken to mean more than that the Courts will not, as in strictness, they cannot, interfere with actual military operations, or whilst war is actually raging, entertain proceedings against military men and others for acts done under so-called martial law. The judgment of the Privy Council, in

1 Ibid pp. 176-77-79.

2 *Channappa Shantirappa vs. Emperor* A.I.R. 1931 Bom. 57.

3 Ibid at p. 66.

4 Ibid at p. 68.

5 Ibid at p. 59.

6 (1902) A.C. 109 at pp 114-15.

7 See not (1) page 499 Halsbury (2nd Edn) Vol. VI.

8 "Law of the Constitution" 8th edition p. 546.

short, whatever the application of its principles to England, asserts nothing as to the jurisdiction of courts when peace is restored in respect of acts done during time of war, and eminent lawyers have held that even in time of war the exercise of jurisdiction by ordinary courts is rather rendered impossible than superseded".

In this case the Privy Council followed one of its earlier decisions given in an Indian appeal: *Elphinstone vs. Bedreechund.*[1] But later the Privy Council entertained two appeals[2] by special leave from decisions by Commissions appointed under the Punjab Martial law Ordinances, and decided them on their meirts. In one of them[3] the Privy Council declined to revise the conclusion of the tribunal on the facts only on the ground that the Board was not a Court of Appeal in criminal proceedings (and not on the ground that a martial law court was no court at law). In a case arising out of the operation of Malabar Martial Law Ordinance, the Madras High Court[4] issued the writ of habeas corpus on the petition of two prisoners who had been convicted by a Summary Magistrate appointed under the Ordinance holding his court outside the proclaimed area of martial law, the alleged offence having been committed inside such area. But occasions for seeking relief in ordinary courts in respect of acts of martial law authorities are few and far between, for not only does the Ordinance establishing such martial law usually contain provisions specifically barring their jurisdiction, but the administration of martial law is followed by an Act of Indemnity, which, in Dicey's words, "legalises illegalities."

It is submitted that if the inference is justified from the Privy Council decisions in the Punjab cases that martial law courts are courts, from which the Privy Council will hear appeals even though unappealable in India, then the logical conclusion follows that 'martial law' is law and as such is examinable by the ordinary courts, certainly after the emergency is over, and perhaps during the continuance of the emergency if such courts are at all functioning.

1 1 Knapp P.C. 316.
2 *Bugga vs. Emperor* (1920) 56 I. C 440 (P C) *Kalinath Roy vs. Emperor* (1920) 59 I.C. 641 (P,C.).
3 *Kalinath Roy. vs Emperor* (1920) 59 I C. 641.
4 *In re Govindan Nair* (1922) 68 I.C. 838. This case was over-ruled in *District Magistrate, Trivandrum vs K. C Mammen* 1939 Mad 120 (F.B.) affirmed by the Privy Council in A.I R. 1939 P.C. 213, but the amendment of Sec. 491 Cr. P. Code in 1923 gives the High Court the same powers. See Chapter VIII. post.

In India there is at present no permanent legislation dealing with situations that call for martial law. Should such a situation arise, it is unlikely that Government will rely on common law powers (if such powers at all exist in India) to deal with it.[1] It will be dealt with, as experience shows, by machinery created by executive legislation. Public reaction to martial law excesses in the Punjab has forced the executive to assume less and less drastic powers by such legislation.[2] But one criticism remains valid that the man on the spot, in a fit of panic, may ask for introduction of martial law which is not justified by actual necessities of the case.

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1 In Sholapur, martial law came into existence before the promulgation of the Ordinance Proceedings of military authorities were retrospectively validated by the Ordinance. See facts in A.I.R. 1931 Bom. 57.

2 In Sholapur was introduced what the Chief Justice described in A.I.R. 1931 Bom. 57 as modified martial law. In Malabar the first Ordinance introduced a simple form of martial law. More stringent measures were authorised by a later Ordinance as the situation deteriorated, For details see "India in 1921-22",

CHAPTER V

Equality Before Law.

In his exposition of the rule of law Dicey laid the greatest emphasis on legal equality. He defined it as universal subjection of all classes to the same law administered by the ordinary courts. He explained that every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. He contrasted the English system with the continental system under which officials are, or have been in their official capacity, to some extent exempt from the ordinary law of the land, protected from the jurisdiction of the ordinary tribunals, and subject in certain respects only to official law administered by official bodies. He devoted the largest chapter of his treatise to a comparison of the rule of law with the French *droit administratif*.

Critics have pointed out that what Dicey was considering by "equality before the law" and "obedience to the law" was that, if a public officer commits a tort, he will be liable for it in the ordinary civil courts. He was not referring to that part of the law which gives powers to and imposes duties upon public authorities and that he ignored that the Government departments enjoy under the common law wide immunity from process, as the prerogative immunity of the Crown extends to Crown servants, who, are in fact, but not in law, responsible for the acts of their subordinates.

(A)—Crown's Immunity in India.

Let us examine the question of Government's immunity in India. Section 176 of the Constitution Act provides for the Government "suing or being sued in relation to its affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed." This throws us on Section 32 of the Government of India Act (1915-19) which was but a reproduction in substance of Section 65 of the Government of India Act 1858. This section gave the right to "all persons and bodies politic to have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of

State for India in Council as they could have done against the East India Company and that the property and effects thereby vested in Her Majesty for the purpose of the Government of India or acquired for the said purpose should be subject and liable to the same judgments and executions as they would, while vested in the Company, have been liable to, in respect of debts and liabilities lawfully contracted and incurred by the said Company" This section was based on section 10 of the Charter Act of 1833

Soon after its enactment, Section 65 of the Act of 1858 came in for interpretation before the Supreme Court[1] at Calcutta The judgment of the Court was delivered by the Chief Justice, Sir Barnes Peacock In *Moment's case*[2] and again in *Venkata Rao's case*,[3] the Privy Council has approvingly referred to this judgment It forms the foundation of the case-law on the question of the extent of the Crown's immunity in India and requires detailed consideration

In this case the question before the Court was Government's liability for accident caused by negligence of workmen employed in Government dockyard The Government's liability being the same as the East India Company's before the Act, the Court had to consider the position of the said Company at the outset It was noted that the Charter Act of 1813 preserved to the Company certain trade monopolies and though it required the separation of administrative and commercial accounts it provided that under certain circumstances one-sixth of the surplus of territorial revenue would go to the Company to pay the statutorily fixed dividend on capital stock "It is clear" proceeds the judgment "that the capital stock and commercial assets of the Company were liable to satisfy any judgment that might be obtained against them" The Charter Act of 1833 abolished the remaining monopolies and required the Company to close their commercial affairs The territories and revenues of possessions were to be held by the Company "in trust for His Majesty, his heirs and successors, for the service of the Government of India" The Company's debts were charged on the revenues of India and the annual dividend on the capital stock was to be received out of the same revenues Section 10 of the Act provided that "all persons and bodies politic shall and

1 *P & O S N Co. vs Secretary of State* (1861) 5 B H C R App 1
2 *Secretary of State vs Moment* (1913) 18 I C 22
3 *Venkata Rao vs Secretary of State* A I R 1937 P. C 31

may have and take the same suits, remedies and proceedings, legal and equitable, against the said Company in respect of the debts and liabilities then existing or to be incurred in future, and the property vested in the Company in trust for the Crown shall be subject and liable to the same judgments and executions in the same manner and form respectively as if the said property were hereby continued to the said Company to their own use "

After tracing the history of statutory liabilities of the Company and the fund out of which they were to be met the judgment proceeded · "In determining the question whether the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to Sovereigns and States, and the reasoning deduced from the maxim that the King can do no wrong, would have no force We concur entirely in the opinion expressed by Chief Justice Grey in the case *The Bank of Bengal versus The East India Company* (Bignel Rep 12) which was cited in the argument, that the fact of the Company's having been invested with powers usually called sovereign powers did not constitute them sovereign"

It was further observed that notwithstanding that the Company were directed by the Charter Act of 1833 to abstain from all commercial business, an exception was made as to such as might be carried on for the purpose of the government, thus they lawfully continued to carry on a trade in opium and salt, which is still continued by the Government Reference was then made to the Bengal Marine and Bullock Train as instances of business carried on by the Company, and liability at law of the Company with respect to them The Court then expressed its opinion that the liability of the Secretary of State for India in Council for the negligence of the dockyard workmen was not only within the words, but also within the spirit, of the Charter Act of 1833 and the Government of India Act of 1858 and that "it would be inconsistent with common sense and justice to hold otherwise "

The argument about the immunity of the Secretary of State in Council as representing the State was considered *obiter* The Court observed "In our opinion his liability to be sued depends upon an express enactment in the Government of India Act, 1858, by which he is constituted a mere nominal defendant for the purpose of enforcing payment, out of the revenues of India, of the debts and

liabilities which had been contracted or incurred by the East India Company or debts or liabilities of a similar nature which might afterwards be contracted or incurred by the Government of India We are further of opinion that the East India Company were not sovereigns, and therefore could not claim all the exemptions of a sovereign , and that they were not the public servants of the Government, and therefore, did not fall under the purview of the cases with regard to the liabilities of such persons , but they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit, and were engaged in transactions partly for the purpose of government, and partly on their own account, which without any delegation of sovereign rights, might be carried on by private individuals There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in conduct of undertakings which might be carried on by private individuals without having such powers delegated to them Where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a Sovereign to exercise them, no action will lie" Reference was then made to *Nawab of Carnatic*[1] and *Heerachand Bedreechund*[2] cases as illustrative of the exercise of sovereign powers and the judgment proceeded "It is clear that the East India Company would not have been liable for any act done by its officers or soldiers in carrying on hostilities, or for the act of any of its naval officers in seizing as prize property of a subject, under the supposition that it was the property on an enemy, nor for any act done by a military or naval officer, or by any soldier or sailor, whilst engaged in military or naval duty, nor for any acts of any of its officers and servants in the exercise of judicial functions"

It is submitted that the correct interpretation of the above remarks is that acts of State are immune from the jurisdiction of municipal courts as also those acts to which immunity is extended by legislation such as Judicial Officers' Protection Act, 1850 (which was on the statute-book when the judgment was delivered) It is no authority for the

1 The claim in this case was based on a treaty between two independent states

2 The claim in this case related to hostile seizure.

proposition that exercise of governmental powers affecting the subject has any such immunity This view finds very strong support from a later decision[1] in which again Sir Barnes Peacock delivered the judgment of the Full Bench The question before the Court was whether compensation could be claimed by a private individual in a suit in civil court for loss occasioned by the Government taking over his private ferry under a Regulation which provided the machinery for settling the amount of compensation The plaintiff was sought to be non-suited on the authority of a previous decision of the Sudder Court, on two grounds (1) because the Magistrate's official acts were exempt from the jurisdiction of the Court and (2) because where Legislature created an obligation to be enforced in a specific manner, performance could not be enforced in any other way The Full Bench accepted the second ground and said "We think that the rule laid down in the decision of the Sudder Court was right, though we do not adopt the reasons there assigned for the rule" This, it is submitted, was dissent from the Sudder Court's proposition that official acts, as such, were exempt from the ordinary court's jurisdiction

The immunity of the Government in India reached its highest watermark in *Nobin Chunder Dey's Case*[2] In this case the plaintiff had deposited money in order to get a license for ganja shops and he complained that he had not been given the license, that his money had not been returned to him, and that he had suffered damages for the alleged breach of contract He was non-suited on the ground that the licensing was only by the way of collecting the duty and that imposition of taxes was in the exercise of sovereign powers properly so called, the decision of Peacock C J being cited as authority The plaintiff was advised by the trial judge to make a proper petition to the Government of India for the return of his deposit—"a petition, which, if not strictly speaking, a petition of right, would of the nature of petition of right"

If this case lays down the law correctly then in India a petition to the executive is substituted for the well known judicial remedy of petition of right It was expressly dissented from by the Madras[3] and Allahabad[4] High Courts but was followed in a later case by Calcutta High Court[5] In

1 *Collector of Pabna vs Ramnath Tagore* (1867) 7 W R 191 (F B)
2 *Nobin Chunder Dey vs Secratary of State* (1875) 1 Cal 11
3 *Hari Bhanji vs Secretary of State* (1879) 4 Mad 344 on appeal 5 Mad 273.
4 *Kishan Chand vs Secretary of State* (1881) 3 All 829
5 *Mclnerny vs Secretary of State* (1911) 13 I C 370

Ross's[1] *Case* Wallis J remarked that the decision denies to the subject in India the relief that is available to the subject in England by way of petition of right in cases of breach of contract or detention of land, chattels or money and thus makes the Crown's immunity more extensive in India than in England The decision, it is submitted, is no longer law in view of the observations of the Privy Council in *Venkata Rao's case* (referred to later).

The narrower question of the Government's liability for the tortious acts of its officers in exercise of governmental powers was exhaustively considered in two Madras cases which came before the Courts at about the same time In *Ross's Case* the cause of action arose out of an order of the District Magistrate directing the closing of a certain labour depot in connexion with recruitment of coolies for the Assam tea gardens. The order was held to be ultra vires but issued in the exercise of sovereign powers It was clearly an act not done in connection with any private undertaking of the Government or any mercantile concern in which Government was engaged In *Cockroft's Case*[2] the plaintiff had been injured by the negligent leaving of a heap of gravel on the road he was using It was held that the laying out and maintenance of a military road was an exercise of sovereign powers and therefore the plaintiff's suit was not maintainable

In *Sri Govinda Chaudhuri's Case*,[3] Rankin C J reviewed in detail the case-law on the subject, and said "It remains so far as one can see, open to the consideration of the Judicial Committee whether or not a suit lies against the Secretary of State for India in Council in respect of an act of a subordinate in connection with the exercise of sovereign or governmental power' Within a few years the question went up to the Privy Council, though as a side issue, in an appeal from the Madras High Court Sir George Rankin was one of the members of the Board which heard and decided it The High Court[4] had dismissed claims for wrongful dismissal, and one of the reasons for doing so was that dismissal of a public servant, though not an act of State. was an act in the exercise of sovereign or governmental powers and certainly not an act of the nature of private

1 *Ross vs Secretary of State* (1915) 19 I C 353
2 *Secretary of State vs Cockroft* (1916) 27 I C 723
3 *Secretary of State vs Srigovinda* A I R 1932 Cal 884
4 *Rangachari vs Secretary of State* A I R, 1934 Mad 516

undertaking On this aspect of the case the Privy Council[1] observed "The reasoning of the Courts below as to Section 32 of the Indian Act of 1919, and its effect and bearing on these actions is another matter to which their Lordships must not be taken to give their assent As at present advised their Lordships are not disposed to think that this section, which is a section realting to parties and procedure, has an effect to limit or bar the right of action of a person entitled to a right against the Govenment, which would otherwise be enforceable by action against it, merely because an identical right of action did not exist at the date when the East India Company was the body if any to be sued If it had appeared that the plaintiff's service under the Act of 1919 was not terminable at pleasure their Lordships are not prepared to say that remedy by suit against the Secretary of State in Council for a breach of contract of service would not have been available to the plaintiff Breach of contract by the Crown can in England be raised by petition of right The fact that for a different reason—namely, that service under the East India Company was at pleasure—a precisely similar suit could not have been brought against the Company does not in their Lordships' view conclude the matter either under cl 2 Sec 32 of the Act or on the reasoning of Sir Barnes Peacock in 5 B H C R App 1"

Recently the question was before the Federal Court on appeal from the Madras High Court The plaintiff's claim was for damages for wrongful restraint by the police The High Court[1] had on the authority of the previous decisions summarily decided in favour of the Crown's immunity The Federal Court[2] accepted without discussion the decision of the High Court as correct The above observations of the Privy Council were not referred to in the judgment

The resultant position may be summarised as follows (1) Government is liable for the tort of its servants in undertakings of a private nature (2) Government is also liable for breaches of contract for which the remedy in England is available by petition of right, *Nobin Chunder Dey's* decision being no longer good law (3) So far as Indian decisions go

1 *Venkata Rao vs Secretary of State* A I R 1937 P C 31

2 *Maharani of Nabha vs Province of Madras*[1] A I R 1942 Mad 539 at p 549

3 *Maharani of Nabha vs Province of Madass* 1944 F C R 195 at p. 207.

Government is not liable for the torts of its servants in the exercise of sovereign powers

It is submitted that Crown's immunity obtains in India either in its entirety or not at all There is not, and there never has been, available in India any procedure analogous to the Petition of Right in England Therefore there is no statutory authority for lifting Crown's immunity in cases where the Petition of right would be available in England, and not lifting it in cases of tort Moreover no one can say in which particular cases remedy by Petition of Right is available in England, for the discretion of the Home Secretary in granting or refusing the Petition is not judicial and is unchallengeable in a court of law If it is correct to state that the Privy Council's observations in *Venkata Rao's case* mean that suits in India are maintainable against the Government for breaches of contract as a matter of right, it is submitted they are equally maintainable in cases of tort arising out of exercise of governmental power

The High Courts[1] have acted on the assumption that the Crown's irresponsibility is undoubted law Authority for this has been sought in the following observations of the Privy Council in *Rogers vs Rajendra Dutt*[2] "The question whether the order was given by the defendant in his public capacity as an officer of the State need not detain us because even if it were and even if that would itself prevent the Government of India or the Secretary of State from being sued, the whole basis of the immunity of the sovereign is that the remedy is available against the individual The civil irresponsibility of the supreme power for tortuous acts could not be maintained with any show of justice, if its agents were not personally responsible for them" But Rankin C J has pointed out in *Srigovindas'*[3] *case* that this assumption is unjustified and that what the Privy Council said does not lead to the conclusion that there would be nothing to consider in a suit against the Secretary of State for India in in Council for the tortious act of an official The instances

1 See remarks of Wallis J in (1913) 19 I C 353 at p 357 Jenkins C. J in *Shibbhajan vs Secretary of State* (1904) 28 Bom 314 at p 323 Sadasiva Aiyar J in *Ross vs Secretary of State* (1915) 31 I C 224 at p. 227 Tyabji J in *Jehangir vs Secretary of State* (1902) 27 Bom 189 at p 212

2 (1860) 8 M I A 103

3 *Secretary of State vs Srigovinda* A I R 1932 Cal 834 at p 840

given in Sir Barnes Peacock's judgment of cases arising out of the exercise of powers of sovereignty for which no action lies relate to acts of State It is submitted that the judgment did not deal, either in the decision of the facts of the case or in observations made obiter, with the exercise of governmental powers not being an act of State

The Indian Legislature had no power to affect the subject's right of suit under Section 65 of the Government of India Act, 1858[1] The restriction has been removed by the proviso to Section 176 of the present Constitution Act

The Constitution Act by Sec 306 gives complete immunity to the Governor-General and the Governors from the jurisdiction and process of Indian courts while in office In recent cases[2] it has been held that the section takes away the common law power of Presidency town High Courts to issue prerogative writs against the Province or the Government The question is yet to be finally decided by the Federal Court

(B)—Liability of the Public Servant.

We now come to the question of personal liability of the public servant if he commits a wrong The subject has to seek redress in the civil or the criminal court, depending on the nature of the wrong of which he complains But before he can reach the court at all he has got to cross hurdles placed in his path by the Constitution Act, the all-India legislation and various provincial legislations More often than not the hurdle proves to be substantial enough to prevent the subject having access to the court at all So far as this is so, legal equality even in the limited sense in which Dicey used the term, is far from being complete in this country

Section 270 of the Constitution Act provides for safeguards of public servants in addition to those already on the statute book of India Sanction of the Governor in his discretion is needed before any civil or criminal proceedings can be instituted against any person employed in connection with provincial affairs in respect of any act done or purporting to be done in the execution of his duty as a servant before the 1st of April 1937 when the Provincial part of Act came into operation As civil proceedings by now have become time-

1 *Secretary of State vs Moment* (1913) 18 I C 22 (P C)
2 *Petit vs Noronha* 1945 F L J 170 H C *In re Banwarilal Roy* (1944) 48 C. W. N 766

barred, and as criminal proceedings taken after this lapse of time are not likely to be effective, this portion of the section is not of any practical importance But similar sanction of the Governor-General is and will be necessary in case of intended proceedings against a person employed in the affairs of the Central Government in respect of any act done or purporting to be done before the coming into operation of the Federal portion of the Act This section of the Constitution Act was enacted with the object of "protecting members of the public services especially security services who before the commencement of the Federal portion of the Act might have done something against certain public men who might subsequently have been called upon to form Government at the centre "[1] So the object with which the Section was enacted was limited and its operation was intended to be temporary But with the indefinite postponement of the introduction of the Federation it has become an almost permanent feature of the Constitution And how it has adversely affected the right of the subject in general[2] against the administration is best illustrated by the *Maharani of Nabha's case*[3]

The plaintiff filed the suit without obtaining the necessary sanction Her case in court was that she was prevented from boarding a railway train by which she intended to travel and that she was not allowed to move out of the railway compound by a sub-inspector of police who posted two constables at the gate of the compound The evidence in the case disclosed that the sub-inspector received orders on the telephone from his superior officer to prevent the plaintiff's husband (the Maharaja, who was a State prisoner) from boarding a particular train, but due either to defective reception or his defective knowledge of English, the sub-inspector understood that the orders applied to the plaintiff and acted accordingly The plaintiff's case was found by the Courts as substantially correct, but relief was denied to her on the ground that the defendants had acted bonafide and in good faith though under a mistaken view of their duty, and therefore were under protection of Sec 270 (1) of the Constitution Act The majority of the Court[4] observed " . it is true that the section places an

1 *Bansi Ram vs Emperor* A I R 1944 Lah 51 at p 52
2 Ibid at p 53 Blacker J observes that "It gives a valuable protection to the subject"
3 1944 F C R 195
4 Ibid at p 211.

aggrieved party at the mercy of the executive government before he can institute a suit even in a civil court in respect of an alleged misconduct of a public servant But this does not relieve the Court of its duty of giving effect to the terms of the statutory provision "

Zafrullah Khan J delivered the dissenting judgment[3] in the case His Lordship observed " assuming that if the defendants had done no more than prevent the appellant from boarding the train their act would have been covered by the language of Sec 270 (1), what justification would there be for holding that the section would also cover their entirely unauthorised and highhanded action in wrongfully confining her ? Being clothed with a little authority the sub-inspector arrogated to himself a great deal more, as is unfortunately often the case in this country, and not merely prevented the appellant from boarding the train, but proceeded wrongfully to confine her in the compound of the station for two hours On this finding it is not possible to hold that the acts of the sub-inspector are covered by the language of section 270 (1) of the Constitution Act " Commenting on the decision of the majority, his Lordship said "The majority express the view that the words (of the section) are wide enough to cover the case of an officer who has acted under a mistaken view as to his duty, whether the mistake be one of fact or law, if only he honestly believed that he was acting in the discharge of his duty I feel considerable hesitation in subscribing to that proposition without qualification as, with all respect, I consider that if interpreted literally it would be found to state the principle too widely " After giving a few illustrations, his Lordship concluded "The result would be that whatever may be the position with regard to a superior officer issuing an unlawful order, his subordinates executing such an order could always take shelter behind provisions of the section, a state of affairs which would amount to putting a premium upon official high-handedness and would reduce the rights of the subject to security of life and limb, liberty and the peaceful enjoyment of property to a mockery A line must be drawn somewhere and it is not suggested by the majority where it should be drawn "

Further protection is afforded by sub-section (2) of section 270 which enjoins on the Court to dismiss proceedings with respect to the official acts done before the establishment

1 Ibid at p 214 ff

of Provincial autonomy or the Federation (as the case may be) unless it is satisfied that the acts complained of were not done in good faith In case of such dismissal the costs incurred by the public servant are to be charged on the public revenues It may fairly be assumed that in cases where sanction is required under Sec 270 (1) the supreme executive will not withhold it except to prevent vindictiveness on the part of the new administration, which was the object with which the section was enacted But sub-section (2) of section 270 by its very terms admits of no such possible exception and is therefore a serious abridgment of the right of the subject to get redress from court for administrative wrongs

It was argued before the Lahore High Court[1] that on the language of section 270, no question of sanction arises until after coming into operation of the Federal portion of the Act The argument was negatived by the Full Bench to which the question was referred It was held that sanction became necessary from the date of the enforcement of the section itself i e April 1, 1937 The sanction must be obtained before the institution of the proceedings It can not operate retrospectively[2] Allegation of bad faith on the part of the defendant official does not dispense with the necessity of obtaining the statutory sanction[3]

Under the ordinary law, the executive is not given the power to stop altogether civil proceedings against the Crown or against a public officer in respect of any act purporting to be done by such public officer in his official capacity Section 80 of the Civil Procedure Code provides for two months' notice before the institution of suit so as to give time for reflection on the legal position and making amends in suitable cases without litigation Section 81 protects the public officer from the coercive processes of the Court during the pendency of the proceedings Section 82 prevents a decree from being operative immediately on its being passed in such cases, again with the object of giving opportunity for satisfying it without the coercive process of execution being brought into action The Constitution Act[4] now provides for the payment out of public revenues of costs incurred by, or damages awarded against, a public servant

1 *Bansi Ram vs Emperor* A I.R 1944 Lah 51
2 *Suraj Prakash v s Emperor* A I R 1945 F C R 24
3 *Nand Kumar vs Pasupati Ghosh* A I R, 1941 Pat 385 at p 387
4 Section 271.

at the discretion of the Governor-General or the Governor, as the case may be, exercising his individual judgment

The executive, however, has got the power of stopping altogether criminal proceedings against a public servant by withholding its sanction, which, under Sec 197 of the Criminal Procedure Code, is an essential condition precedent to the institution of such proceedings In a country where the political gulf between the rulers and the ruled is as wide as in India, it is natural that such power in the hands of the executive should be regarded with the greatest mistrust And this is not lessened by the Constitution Act not only giving to the executive similar control over civil proceedings till the establishment of Federation in some indefinite future, but putting the protective sections of the Procedure Codes out of reach of the legislatures in India except with the consent of the Governor-General or the Governor as the case may be[1] Even the provisions of Civil Procedure Code, which cannot absolutely defeat the subject's right of suit, gives wider protection than the English statutes, among them Public Authorities Protection Act, that were considered by the Privy Council in *Bhagchand vs Secretary of State*[2]

Legal ingenuity in India has attempted to limit the scope of the words "an act purporting to be done in official capacity" occurring in the Civil Procedure Code and "acting or purporting to act in the discharge of his official duty" in the Criminal Procedure Code The result has been a huge volume of case-law in which decisions are not altogether reconcilable with one another either as to the extent to which they go or as to the reasoning on which they are based This case-law was reviewed by the Federal Court in *Horiram*[3] *Singh's case*, a criminal case Vardachariar J observed "the question is substantially one of fact, to be determined with reference to the act complained of and the attendant circumstances, it seems neither useful nor desirable to paraphrase the language of the section in attempting to lay down hard and fast tests" When the question again arose later in the *Maharani of Nabha's case*, a civil case, even the Federal Court judges, as has been seen above, differed in their conclusions on the admitted facts of the case And this is remarkable in view of the following

1 Ibid
2 (1927) 104 I C 257 at p 266
3 *Hori Ram Sing vs The Crown* 1939 F C R 159 at p 187

obiter of Varadachariar[1] J in the earlier case "There are in my opinion, strong reasons against placing an unduly wide interpretation on this provision (Section 270 of the Constitution Act) It was, no doubt, intended to afford a measure of protection to public servants , but it was not Part of the normal protection of such servants That it was meant to provide for an exceptional situation is shown by the fact that it relates only to acts done at a particular juncture(i e before the relevant date) Section 270 (1) applies not only to criminal proceedings, like section 197 of the Criminal Procedure Code, but also to the institution of civil proceedings In the initiation of criminal proceedings the protection of public interest is the main concern, and it may well be left to the local Government to determine the question of the expediency of a prosecution from that point of view But when a citizen seeks a civil remedy against a public servant, the Legislature must be presumed to have been very cautious in depriving the aggrieved citizen of redress in a court of law and any restrictions on such a remedy imposed in the interest of a public servant should not be lightly extended so as to unduly restrict the remedy of the citizen" Where the most eminent judges dealing with encroachment on the subject's highest constitutional right, the right to personal liberty, differ even in a civil case, the conclusion is justified that the law is dangerously uncertain

The liability for the wrongs committed by public officers in their official capacity is governed generally speaking, by the English common law relating to torts Very little of this branch of law, has been embodied in Indian statutes the most notable among them being Judicial Officers' Protection Act, 1850 This Act has been held[2] to be a statutory enactment of the common law and that "there is no distinction between the English and Indian law on the subject of the protection to be given to Judicial and Revenue officers" The Privy Council[3] has held that the protection afforded by the Act is not available to the Police or the Magistrate in the exercise of police powers or to an officer in command of a cantonment

There is no liability for bonafide exercise of powers invested in an officer by a statute "There can be no rule

1 Ibid at pp 189-90
2 Per Telang J in *William Allen vs Rai Shri Dariaba* (1896) 21 Bom 754 at pp 767-68
3 *Sinclair vs. Broughton* (1882) 9 Cal 341 (P C) at p 353

more firmly established" the Privy Council[1] has observed "than that if the parties bona fideand not absurdly believe that they are acting in pursuance of statutes and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act" In a later case[2] their Lordships said "It will be observed that their Lordships are only dealing with a case in which no malice, in the most general sense of the term, is imputed or proved against the defendant (i e the public officer) It is unnecessary to consider what would have been their judgment in a case in which the defendant had given the same advice to the Government, and done the same act towards the plaintiffs from any indirect motive, or with direct malice against them It is enough to say, that the decision of such a case would turn on totally different principles from the present"

There is no relationship of master and servant between a subordinate and a superior public officer, both being equally servants of the Crown Thus it was held[3] that the Sheriff was not liable for the wrong done by the bailiff But if the superior officer authorises or ratifies the wrong done by a subordinate he is liable, and his liability rests on the ordinary law of agency[4] The order of a superior officer is no defence to an action against the subordinate, unless the law specifically allows such a defence Police Acts in different provinces give protection to officers who give effect in good faith to orders issued by apparent authority[5] But nothing is done in good faith which is done without due care and attention, and a police officer is not bound to obey the order of a superior officer which is manifestly not made in good faith So where both the station-house officer and the constable had fired on an unlawful assembly and it was found that neither of them believed that it was necessary for public security to disperse it by firing, it was held that both were liable in law, and that the station-house officer's order did not protect the constable[6]

The same principle applies in the case of liability of the

1 *Spooner vs Juddow* (1848-50) 4 M I A 353 at pp 379-8
2 *Rogers vs Rajendra Dutt* (1860) 8 M I A 103 at pp 134-5
3 *Bombay Sheriff vs Hakimji Motaji* (1927) 104 I C 127
4 *Secretary of State vs J C, Maurice* A I R 1937 Rangoon 89 at p 93
5 Per Viscount Sumner in *Bhagchand vs. Secretary of State* (1927) 104 I C 257 at pp 264-65.
6 *King-Emperor vs Subba Naik* (1898) 21 M. 249 See also *Allah Rakhio vs Emperor* (1922) 83 I C 702

soldier In *Keighley vs Bell*,[1] which related to incidents that had occurred in this country, Willes J said "I believe that the better opinion is that officer or soldier acting under the orders of his superior, not being necessarily or manifestly illegal, would be justified by his orders" This protection is statutorily given by Sec 76 of the Indian Penal Code which enacts that nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it With reference to this section, Rattigan J[2] observed "To entitle a person to claim the benefit of that section (s 76) it is necessary to show the existence of a state of facts which would justify the belief in good faith, interpreting the latter expression with reference to Section 52, that the person to whom the order was given was bound by law to obey it Thus in the case of a soldier, the Penal Code does not recognise the mere duty of blind obedience to the commands of a superior as sufficient to protect him from the penal consequences of his act Difficult as the position may appear to be, the law requires that the soldier should exercise his own judgment, and unless the actual circumstances are of such a character that he may have reasonably entertained the belief that the order was one which he was bound to obey, he will be responsible like any other sane person for his act, although he may have committed it under the erroneous supposition that his superior was by law authorized to issue the order His mistake in short may be a mistake entertained in good faith on a question of fact Such a construction of the law may indeed subject the soldier to military penalties, and, in certain cases place him in the serious dilemma of either refusing to obey an order which he believed to be unjustifiable in law, thereby rendering himself liable to military law, or, by obeying it, to subject himself to the general criminal law of the land But on a balance of considerations the Legislature has deemed it wise for the safety of the community that no special exemption should be allowed to a soldier who commits what would ordinarily be a penal offence from that enjoyed by any other person who does the same act believing in good faith that he is bound by law to do it A mistake of law in either case would afford no protection, though it might go in mitigation of punishment, and thus military discipline, while it regulates the conduct of

1 (1866) 4 F & F 763

2 *Niamat Khan* No 17 P R 1883 Cr at p 39.

the soldier in military matters, is made subject to a higher law in favour of public safety, when the act which the military discipline attempts to enforce or to justify is one which affects the person or property of another In such a case the *civil* law looks to the surrounding circumstances to see whether they are of such a character as would lead a man of ordinary intelligence to entertain a reasonable belief that he is bound by law to obey the command of his superior"

(C)—Racial Discrimination before Law

The last remnant of inequality before law based on racial discrimination between subject and subject and what is worse even between an Indian subject and a European or American alien is contained in Chapter 33 of the Criminal Procedure Code (as amended in 1923) It provides for procedural advantages in criminal courts when a member of the privileged community is a party and claims his privileges The history[1] of this inequality is an interesting study but not necessary for this thesis It is enough to say that it arose out of the distinction between the Company's courts in the interior of the country and the King's courts in the Presidency towns in the early days of the East India Company The Europeans were subject only to the jurisdiction of the King's courts, and if residing in the interior had to be brought to the Presidency town to stand his trial In *Calder vs Halkett*[2] the Privy Council had before it a case in which the claim of the plaintiff was that as a European subject he was exempt from the jurisdiction of the criminal court in the district of Nadia, and that his arrest and detention under the orders of the Magistrate of the District (himself a European British subject) was illegal and entitled him to damages The incident had happened in July-August 1834 On that date the European British subject was exempt from the jurisdiction not only of the criminal courts but to a large extent of civil courts also in the districts Legal inequality was abolished in 1836 with respect to civil courts and in 1923 was reduced to advantages in matter of

1 See Mr Samarth's speech in the Indian Legislative Assembly reported in "India's Parliament" vol. 2 p 38ff

2 (1840) 2 M I A 293

procedure and in some cases of sentence in criminal courts[1] Sec 108 (2) (d) of the Constitution Act prohibits the Federal Legislature to deal with legislative proposals affecting these privileges without the previous sanction of the Governor-General in his discretion

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1 The law as it stood before the 1923 amendment was summarised by the Home Member in the Legislative Assembly as follows "In the first place the provisions regarding security for good behaviour do not apply to European British subjects who come within the mischief of the European Vagrancy Act They have more extensive right of appeal They have also an option of appealing either to the High Court or the Court of Sessions They have more extensive rights in the matter of habeas corpus They are not triable by second or third class magistrate or even by a magistrate of the first class unless he is a justice of the peace (And no body could be appointed a justice of the peace outside the presidency towns unless he was a European British subject An amendment of 1882 made District Magistrates and Sessions Judges ex-officio Justices of the Peace and the Government was given power to make other judicial officials Justices of the Peace Even so the Sessions Judge could not inflict a sentence of more than one year's imprisonment) Then finally, in cases of trial before a High Court, a Sessions Court or a District Magistrate, European British subjects are entitled to be tried by a jury of which not less than half shall be European British subjects"—India's Parliament Vol II p 50

The old Constitution Act, which was in force up to the 31st of March 1937, contained a section (section 111) which provided that "the order in writing of the Governor-General in Council for any act, shall, in any proceeding, civil or criminal, in any High Court acting in the exercise of its original jurisdiction, be a full justification of the act, except so far as the order extends to any European British subject" This section can be understood only with reference to the days when the Supreme Court (the predecessor of the High Court) refused to recognise the validity of proceedings and decisions of the Company's Courts (with no jurisdiction over European British subjects) in the districts and encouraged challenges to them which had therefore to be statutorily protected

CHAPTER VI

The Ordinary Courts

The subjection of the executive to law is of little value to the subject unless there is machinery to give him relief and remedy if the executive overstrips its legal powers Moral or political sanctions do not avail him much, what is needed is effective legal sanction In British jurisprudence this machinery is provided for in the Courts, which force the State as much as the subject to keep within the bounds of the law In *Entick vs Carrington*[1] Lord Camden C J after finding that neither statute law nor common law justified the issue by the Secretary of State of warrants to search the plaintiff's papers, dealt with the question of state necessity as a justification in the following words "It is then said, that it is necessary for the ends of government to lodge such a power with a state officer With respect to the argument of State necessity or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions Sergeant Ashby was committed to the Tower in the 3rd of Charles I, by the House of Lords only for asserting in argument, that there was a law of State different from the Common law, and the ship-money judges were impeached for holding first, that State-necessity would justify the raising of money without consent of Parliament, and secondly that the King was judge of that necessity If the King himself has no power to declare where the law ought to be violated for reasons of State, I am sure we his judges have no such prerogative"

In India also the courts are King's courts and the judges are King's judges The Government of India Act, 1858, rendered obsolete the old distinction between Company's courts and King's courts[2] The courts administer the law on the same principles as the courts in the United Kingdom The Crown has no greater prerogative power to establish courts in India than it has got in England and the judges in India have no greater prerogative than the British judges to allow violation of the law, 'for reason of State'

1 (1765) 19 St Tr 1030 at p 1074
2 *Ryots of Garabandho vs Parlakamedi* A I R 1943 P C 164 at p 179

The East India Company was brought into existence by the exercise of the Prerogative Royal, which the imperious Tudor Queen declared that she "would not in that behalf have argued or brought into question" For more than a century and a half its affairs were managed under charters granted under the Prerogative The Charter of 13 Charles II (1661) was the first charter of the East India Company to contain any provision for the administration of justice[1] It gave judicial powers to the Governor and his Council The judicial charters of 1726 and 1853 established King's Courts in Calcutta, Madras and Bombay They were superseded by the Supreme Courts created by the Regulating Act of 1773 and subsequent Acts and prerogative courts in India came to an end Other courts were established by legislation by the Government in India enacted under the authority of Parliamentary enactments All the courts in India were thus given a statutory basis

Can the Crown erect new courts of justice in India by virtue of the Prerogative? The opinion of the Crown Law Officers[2] was given in 1856 that when the Crown has once established a court of justice by Charter in pursuance of an Act of Parliament, it exhausts its whole power and cannot revoke the charter (e g the Indian High Courts) Having been given representative institutions, India, it is submitted, now comes under the principle of the *Bishop of Natal's* case[3] It was laid down in that case that where once representative institutions have been conceded to a colony, the Crown stands to that colony in the same position as it stands to the United Kingdom And further that "it is settled constitutional principle or rule of law, that although the Crown may, by its prerogative, establish courts to proceed according to the common law, yet it cannot create any new court to administer any other law, and it is laid down by Lord Coke in the Fourth Institute that the erection of a new court with a new jurisdiction cannot be without an act of parliament" It may further be mentioned that from the very beginning Indian legislative authority had ample powers to create courts[4] and hence it has not been found necessary to requisition Prerogative, if there is any, for the purpose

1 The Law Commissioners' (1853) First Report p 210

2 Forsyth's "Cases and Opinions" p 386

3 3 Moore's P C Cases (N S) p 115

4 e g Regulation III of 1793 See *Empress vs Burah* 4 Cal 172 (P C)

The highest court for Indian cases,[1] however, is the Prerogative Court of the Judicial Committee of the Privy Council As His Majesty the King is supreme over all persons and courts within his dominions, a right of appeal in all cases civil and criminal exists from the highest court of each separate Dominion, colony, province, state or possession except so far as the prerogative in this behalf has been surrendered The Judicial Committee of the Privy Council is an Imperial body representing the Empire and is no more English than it is, for instance, Indian, Canadian or South African Strictly speaking the Committee has no location The sovereign is everywhere throughout the Empire in the contemplation of the law, and it is only for convenience that the Committee sits in London Criminal proceedings, however, will only be reviewed if it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial or grave injustice has been done[2]

The Courts in India, without exception, are statutory[3] The Federal Court stands as the apex of the judicial system in the country For the present its powers are limited to hearing original suits between the different units of the Indian Federation inter se or between unit or units and the Indian Federation and appeals from the High Courts whether civil or criminal in which a certificate has been given that the case involves a substantial question of constitutional law The Constitution Act makes provision for the enlargement of its powers to hear civil appeals, It is not and cannot be a general court of criminal appeal In the exercise of its original jurisdiction the Federal Court enforces the rule of law in a higher sphere, that is in disputes between the Governments[4]

The High Courts in India are divided into two categories—those created by Letters Patent granted under the authority of Parliamentary enactments and others created by Indian legislation Their common characteristic is that

1 As far back as 1726, provision was made for final appeal to the King in Council from the decisions of the Mayor's Courts

2 Halsbury 2nd edn , Vol 8 p 552 See speech of Lord Haldane in *Hall vs M' Kenna* (1926) I R 402

3 *Bugga vs Emperor* A I R 1920 P C 23 at p 26

4 Cf *A G of Canada vs A G of Ontario* (1910) A C 637 "Such a conflict may always arise in the case of states and provinces within a Union But the conflict is between one set of legal principles and another"

they are courts of general civil and criminal appeal from the subordinate courts within their respective territorial jurisdictions A few of them only have limited original jurisdiction Under each of the High Courts there are two hierarchies of courts—one civil the other criminal The criminal courts are constituted under the powers given by the Criminal Procedure Code, a piece of all-India legislation, which also lays down the procedure they are to follow The civil courts in each province owe their origin, generally speaking, to the legislation by the Province concerned But they are required to follow the procedure laid down in the Civil Procedure Code, again an enactment of the Central Legislature, which, by section 9, has given them "jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred"

These are, in the words of the Privy Council, 'the ordinary tribunals of the country'[1] 'the established courts of justice'[2] —creations of the statutory common law of India The principles on which justice is administered in England have been evolved by the experience of centuries of the judiciary Those principles are enshrined in the great statutes of adjective law in India, the Codes of Procedure and the Evidence Act Where these statutes are silent the Indian Courts have free recourse to the English principles and practice

The Committee on Ministers' Powers laid down the following three rules of natural justice on which the British administration of justice is based (i) no one must be a judge in his own cause (ii) no party is to be condemned unheard (iii) a party is entitled to know the reasons for the decision To these the following may be added—that the trial of a cause should be open and public, that the subject's right of access to the Courts cannot be restricted except by law In a recent case[3] the Privy Council enumerating the essential principles of justice said "An obvious example would be a conviction following a trial where it could be seriously contended that there was a refusal to hear the case of the accused, or where the trial took place in his absence,

1 *Maharaja Moheshwar Singh vs Bengal Government* (1859) 7 M I A 283 at p 310

2 *Express vs Buriah* 4 Cal 172 P C at p 180

3 *Mohammad Nawaz vs Emperor* A I R 1941 P C 132 at p 133

or where he was not allowed to call relevant witnesses Similarly, of course if the tribunal was shown to have been corrupt, or not properly constituted, or incapable of understanding the proceedings because of the language in which the proceedings were conducted Another obvious example would arise if the Court had no jurisdiction either to try the crime or pass the sentence"

All the above principles are binding on the Indian courts Both the Codes of Procedure have got provisions for transfer of cases for trial from one competent court to another [1] One of the most valid grounds for ordering such transfer is that the judge has interest in the case either pecuniary or otherwise which is such as to create a bias In the leading case on the point,[2] reliance was placed wholly on English cases, among them *Dimes vs The Proprietors of the Grand Junction Canal*[3] from which the following passage was cited "No one can suppose that Lord Cottenham (then the Lord Chahcellor) could be, in the remotest degree, influenced by the interest that he had in this concern, but, my Lords, it is of the last importance, that the maxim that no man is to be a judge in his own cause, should be held sacred It will have a most salutary influence on these (inferior) tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was, on that account, a decree not according to law and set it aside "

A person who is threatened with legal proceedings which are calculated to affect his person or property has an aboslute right to be heard in his defence It is a right which is implied by natural justice It is a powerful principle of justice in all judicial proceedings[4] and stress has been laid on it again and again by the Privy Council In *Ganeshwar Sing vs Ganesh Das*[5] their Lordships expressed their entire agreement with the Judges of the High Court "that it is an elementary principle, binding on all persons, who exercise judicial or quasi-judicial powers, that an order should not be made against a man's interest without there being given to

1 S 24 Civil Procedure Code and S 526 Cr P Code
2 *Lobun Domni vs Assam Rly and Trading Co , Ltd* (1884) 10 Cal 3at 915 p 919
3 H L R 759 (793)
4 *Sitao Jholia vs Emperor* A I R 1943 Nagpur 36 at p 42 citing *The King vs Nilson*(1835) 111 E R 624 at q 627 and *Wood vs Wood* (1873) 9 Ex 190 at pp 196-7 in support
5 (1906) 33 Cal 1178 P, C at p. 1182

him an opportunity to be heard" Where a foreign judgment on an award had been obtained in default of appearance, the Judicial Committee[1] held that a suit in India based on such judgment was not maintainable[2]

This right is very fully recognised in the ordinary procedural law of India In a criminal case an accused has got the absolute right of being defended by a lawyer,[3] and the word 'accused' has been given liberal interpretation[4] as meaning not only one accused of an offence but also any one over whom the criminal court exercises jurisdiction All evidence must be recorded in the presence of the accused, and he has the fullest statutory right of testing the evidence against him by cross-examination[5] Similarly his right to produce evidence in his own defence is absolute[6] The Court is enjoined to listen to and weigh the arguments that may be advanced by him or on his behalf The trial must be open and the judge must give his reasons for his decision before pronouncing final order[7] Even so the procedure prescribed by the Code is "subject to the limitation that no course should be taken by reason of which the accused may be prejudiced either because he is not fully aware of the charge made or is not given a full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred"[8] There are similar provisions with necessary variations for civil cases in the Civil Procedure Code

By far the greater volume of litigation in India takes place initially in the inferior courts The judges presiding over these courts are necessarily not men of the highest calibre, though as the Civil Justice Committee pointed out in its report,[9] the Privy Council in a number of cases has expressed appreciation of the work done by the subordinate judges on the civil side The Codes therefore make generous

1 *Oppenheim & Co vs Haneef* (1923) 45 Mad 496 P C
2 Curiously enough Section 23 of the Judicial Committee Act, 1833 gives full force and validity to a Privy Council decree against a party dying before hearing by Privy Council See *Kalyani Pillai vs Thiruvenkataswami* (1923) 80 I C 85 *Chandra Chur Deo vs Shyam Kumari* A I R 1932 Pat 261 *Ghasiram Marwari vs Shiba Prasad Singh* A I R 1937 Pat 321
3 Sec 340 Cr P Code
4 *Mona Puna* (1892) 16 Bom 661
5 Sec 353 Cr P Code and S 138 Evidence Act
6 Sec 256 Cr P Code
7 Secs 366-373 Cr P Code
8 *Thakur Singh vs Emperor* A I R 1943 P C 192 at p 195
9 P 328

provisions for appeals from the decisions of these courts which are heard finally by the High Courts, the Federal Court and the Privy Council But an appeal is a statutory right which the appellant must show affirmatively exists in his particular case The High Courts in India have therefore been further given very wide powers of revision over the proceedings of the subordinate courts by both the Codes In a classic judgment, a Full Bench of the Bombay High Court described this jurisdiction as "the Court's visitatorial and superintending, i e extraordinary jurisdiction, analogous to that of the Queen's Bench over the inferior Common Law Courts in England exercised through the Writs of certiorari, of mandamus and of prohibition" In a very recent case[2] from the same High Court Beaumont C J (Wassodev J concurring) observed as follows "Without attempting to define the exact limits of revisional jurisdiction, I should say, broadly speaking that the Court acts in revision when it interferes with the decision of the lower Court on the ground that there has not been a fair and proper trial, that the order passed is not 'according to law', for example there has been some error in procedure or the judge has not brought his mind to bear upon the real question"

The lower criminal judiciary in India are manned by officers in whom are vested both executive and judicial functions The District Magistrate is the Collector and the executive head of the district and also as the Chief Magistrate, the head of the magistracy for deciding criminal cases This amalgamation of functions has made the magistracy susceptible to executive influence, whether exercised by the bureaucratic or by popular government and has led to abuses The visitatorial and superintending jurisdiction of the higher tribunals has afforded some measure of check to such abuses The Calcutta High Court[3] has observed "It may be necessary, for reasons to which we need not advert on the present occasion, that in certain parts of the country executive and judicial functions should be united in the person of the same individual, but this union of duties is an abnormal state of things, and experience of its operation is not wanting in instances to show that in the interests of justice,the

1 *Shiva Nathji vs Joma Kashinath* (1882) 7 Bom 341 (360)

2 *Dinshaw Iron Works vs Markhan Adamji & Co*, A I R 1943 Bombay 42 at p 43

3 *Lobuni Domini vs Assam Ry and Trading Co, Ltd*, (1884) 10 Cal 915 at p 917

discharge of judicial duties by an officer who also exercised executive functions cannot be too carefully watched" In this particular case, the question was not that there was any attempt by the executive to influence the judicial decision of the magistrate, but that the magistrate as an executive officer had formed and expressed an opinion on the merits of the case, which later on came up before him, as a Court, for judicial determination

In the exercise of these wide powers the High Courts have often emphasised the rules of natural justice enunciated by the Minister's Powers Committee and embodied in the various provisions of the Procedure Codes When witnesses were examined by the lower court without objection from the accused's legal representative but in the absence of the accused, the Patna High Court[1] declared that the trial was altogether vitiated by the irregularity The lower court took up the case on a date not previously fixed and passed order behind the back of the parties On appeal the High Court[2] sent back the case to be tried according to law In 1892 the Allahabad High Court[3] heard an appeal from a case in which almost all the rules of natural justice had been violated The three eminent English judges (Edge C J Tyrell and Knox JJ) who decided the appeal prefaced their judgment with the following general remarks "An appellant who exercises a right of appeal is entitled to allege, and in the best way he can to prove, that there was no valid trial according to law that the judge who tried him acted illegally and with material irregularity in the course of the trial, that the judge by his conduct of the trial precluded a fair trial being had, that the judge in passing sentence had acted in violation of the provisions of the Criminal Procedure Code, and that at the time when such sentence was passed there was no record as required by law of the conviction which must precede and be the justification for the sentence" In this case the trial judge had threatened witnesses for the defence while in the box, had committed them to police custody, had examined them as Court witnesses On this point their Lordships said that 'the procedure, in our experience, is unprecedented in modern times in any part of His Majesty's dominions and was entirely illegal" The inquisitorial cross-examination of the accused was condemned

1 *Bigan Singh vs Emperor* (1928) 6 Pat 691
2 *Basdeo Sing vs Ramraj Sing* A I R 1932 All 166
3 *Hargovind Singh* (1892) 14 All 242

as illegal About the necessity of recording reasons for the conviction before the sentence was pronounced, the following comment was made "The requirements of sections 366 and 367 are no mere matters of form The provisions of those sections are based upon good and substantial grounds of public policy, and whether they are or not, the Sessions Judges must obey them and not be a law to themselves The law wisely requires that the reasons for the decision shall accompany the decision, and shall not be left to be subsequently inserted or recorded" Before arriving at a decision the judge is in duty bound to attend to the arguments of the counsel for the parties Trevelyan J in a Calcutta[1] case held that "as the learned Magistrate came to the conclusion without attending to the arguments of Counsel, it follows that the trial before him was not a fair one" In the same case Prinsep J was of opinion that "a judgment written after the sentence had been pronounced was not a judgment according to law as it was not delivered in open court" In a recent case from Swaziland while deciding that the assessors must give their opinion in open court, the Privy Council referred to Section 309 of rhe Criminal Procedure Code [2]

It now remains to deal with the question of the independence of the judges in India Courts are of little avail to the subject if the judges are susceptible to outside influences They were powerful engines of oppression during the last days of the Stuarts when they acted as mere tools of the executive, giving the cloak of legality to their acts of high-handedness But the Act of Settlement secured judicial independence In its legislation about judiciary in India Parliament has, more or less, followed the same policy of safeguarding judicial independence A Full Bench of the Allahabad High Court,[3] composed of all the judges of the Court except one, observed "The intention of Parliament in framing the Acts under which the Supreme Courts in India were constituted and in passing the 24 and 25 Vict cap 104 (Indian High Courts Act, 1861) must have been to establish judicial tribunals which would command the respect of the people of this country, and which would not be liable to any possibility or suggestion of influence on the part of the Executive"

The Joint Parliamentary Committee[4] testified to the high reputation enjoyed by the High Courts in India for their

1 *Damu Senapati vs Sridhar* (1894) 21 Cal. 121
2 *Mahlikilili vs The King* A I R 1943 P C 4 at p 7
3 *Q E vs Gangaram* (1892) 16 All 136 at p 152
4 Report—paras 331 and 334

ability and impartiality The present Constitution Act has still further strengthened the position of the higher judiciary in India in some matters [1] The tenure of the judges, which was technically during pleasure under the old constitution,has been made during good behaviour up to a specified age During his tenure a judge of the High Court or of the Federal Court can be removed from office only on the report of the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, that he ought to be removed on the ground of misbehaviour or of infirmity of mind or body The provisions of the old constitution applied only to the High Courts established by Letters Patent, the Courts of appeal established by Indian legislation were left out Under the new constitution, all courts of appeal in India are brought under the purview of parliamentary legislation

The present constitution further gives parliamentary sanction to the High Court's administrative control over the subordinate civil judiciary [2] But it leaves the criminal magistracy practically untouched, and executive officers continue "to exercise enormous (judicial) powers, often far greater than those of a Justice of the Peace or several justices sitting together in Sessions" [3] The powers of superintendence over all subordinate courts within its appellate jurisdiction, which the High Court had under Sec 107 of the old constitution, were interpreted to include judicial as well as administrative powers [4] The present constitution, by Sec 224 (2), specifically lays down that the High Court shall have no jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision by virtue merely of the powers of superintendence vested in it That the High Court's powers of superintendence should be cut down in this way is, in the words of Beaumont[5] C J, "an unfortunate thing"

The present constitution continues the eligibility of the members of the Civil Service to be judges of the High Court It makes an innovation over the law prevailing for more than a century and a half in allowing such a member to be the Chief Justice provided he has been on the High Court

1 Secs 101-105 of Government of India Act (1915) and Secs 200 ff of the Government of India Act, 1935

2 Sec 255 Government of India Act, 1935

3 Per Jardine J in *Ganesh Narayan Sathe* (1889) 13 Bom 600 at p 626 Sec 30 Cr P Code provides for vesting in the magistrates vastly greater powers than those which excited his Lordship's astonishment

4 *Balkrishna vs Emperor* A I R 1943 Bom 1 (F B) in which all the earlier authorities are reviewed

5 Ibid at p 5

Bench for a period of three years The Joint Parliamentary Committee[1] duly noted the opposition in this country to the civil service judges on the ground that they tend to favour the executive against the subject But their continuance was recommended as "they bring to the Bench a knowledge of Indian country life and conditions which barristers and pleaders from the towns may not always possess."

The influence of the Judicial Committee of the Privy Council in making the Indian judiciary conform to the highest ideals of administration of justice has been immeasurable[2] From the earliest days of England's connection with India, their Lordships have been hearing appeals from the Indian courts, both the Company's courts and the King's Courts, and the principles of British jurisprudence have filtered down to the remotest corners of the land through their judicial pronouncements It has always been obligatory on the subordinate Courts to follow the precedents of the higher courts[3] This principle has been given statutory sanction by Sec 212 of the Constitution Act, which enacts that "the law declared by the Federal Court and by any judgment of the Privy Council, shall, so far as applicable, be recognised as binding on, and shall be followed by, all courts in British India"

Of the two kinds of ordinary courts, civil and criminal, there is, contrary to what is popularly supposed, no subordination of one to the other The whole question was exhaustively discussed by a Full Bench of the Calcutta High Court,[4] Rankin C J presiding It was held, that the criminal courts were under no duty "to maintain the decree of the civil court" In *Thorne vs Motor Trade Association*,[5] the House of Lords had to deal with a question over which the Court of Appeal[6] and the Court of Criminal Appeal[7] had arrived a contrary findings Their Lordships upheld the decision of the Court of Appeal and overruled the decision of the Court of Criminal Appeal But throughout their Lordships' several speeches there is no indication whatsoever, that the decision of the civil court as such stood on any higher level than that of the criminal court

1 Para 331
2 "The Lordships of the Privy Council say it is specially in India that purity in administration of justice must be secured"—per Jardine J, 13 Bom at p 626
3 *Vedanta vs Kannyappa* (1886) 9 Mad 14 (F B) at p 15
4 *Agni Kumar vs Mantazuddin* (1928) 56 Cal 290 (F B)
5 1937 A C 797
6 *Hardie and Lane vs Chilton* (1928) 2 K B 306
7 *Rex vs Debyer* (1926) 2 K B. 258

CHAPTER VII

The Judicial Control

(A)—Right of access to Court

Wherever there is a Court, and access to it is not barred by law, the subject's right to resort to it for the enforcement of legal rights and for the redress of legal wrongs, cannot be defeated on any consideration This principle was affirmed by the Privy Council in a case which came before it from the agency tract in the Madras Presidency wherein ordinary courts had no jurisdiction The appellant had originally filed the suit in the court of the Agent at Vizagapatam It was transferred by the High Court to the District Court of Vizagapatam, which dismissed the suit Later on the High Court found that the earlier order of transfer was illegal and without jurisdiction The appellant, thereupon, re-instituted the suit in the Agent's court, but it was dismissed as barred by res-judicata in view of the District Court's decision The appellant appealed against this order to the Governor-in-council, who was empowered under the law to hear appeals from the Agent's court The appeal was dismissed as inexpedient and as setting a bad example and encouraging multiplicity of suits On further appeal, the Privy council[1] set aside the order of the Governor-in-council and observed "The legal right to bring a suit and to have it determined by the proper court created for the purpose of determining such suits cannot be barred by considerations of policy or expediency"

In another case, in which the contention in a civil suit was that revenue authorities had exercised jurisdiction where they had none under the law, the question had been framed by the High Court in the following terms [2] "Whether, if these provisions (i e of Act IX of 1847) are not so applicable, a civil court should, in the exercise of its discretion, make a decree declaring that the proceedings of the revenue authorities in respect of such land are ultra vires" The Privy Council expressed the opinion that "the question should be

1 *Maharaja of Jeypore vs Patnaik* (1905) 28 Mad 42 (P C) at p 50 The facts are fully set out in the High Court judgment reported in 23 Mad 329

2 *Secretary of State vs Fahdunissa Begum* (1889) 17 Cal 590 P C at p 598

stated somewhat differently viz whether if these provisions are not so applicable, a civil court has jurisdiction to review the decision of the Board of Revenue and to declare that the proceedings of the revenue authorities in assessing such land are ultra vires" And went on to observe as follows "it appears to their Lordships that if the civil court has jurisdiction at all that jurisdiction can be invoked as a matter of right, and that it is not a case for the exercise of the court's discretion If the party appealing to the civil tribunal can establish that the court has jurisdiction, and that the Board have acted ultra vires, he is, in their Lordships' opinion, entitled as of right to a decree"

The inalienable right of the subject to have access to the Courts is ensured by the wide terms in which the Procedure Codes vest jurisdiction in the ordinary courts Sec 9 of the Code of Civil Procedure enacts that "the Courts shall have jurisdiction to try all suits of a civil nature excepting those suits of which their cognisance is either expressly or impliedly barred" It gives statutory recognition to a well-recognised principle of law[1] Sitting on a Full Bench[2] of five judges of the Allahabad High Court, Mahmood J, one of the foremost of Indian jurists, said "What seems to me necessary is to state that I attach a very liberal and vast interpretation to the general terms of the section for purposes of determining the question whether or not suits which are, as a matter of fact, instituted in the civil court are or are not cognisable by such tribunal" "It is well-settled law" the Privy Council has observed in a recent case[3] "that the exclusion of the jurisdiction of the civil courts is not to be readily inferred but that such exclusion must be explicitly expressed or clearly implied" "The terms of the section", the Privy Council[4] has said in another case, "lay down a general rule in favour of the jurisdiction of the civil court, and the burden of proof is clearly on the party who maintains an exception to the general rule" To oust the civil court's jurisdiction the existence of a legislative enactment is required[5]

(B)—Revenue Courts

Of the legislative enactments barring the civil court's

1 *Meher Chand vs Mulkhi Ram* A I R 1932 Lah 401 (F B) at p 402
2 *Shankar Sahai vs Din Dial* (1889) 12 All, 409 at p 417
3 *Secretary of State is Mask & Co.*, A I R 1940 P.C 105 at p 110
4 *Ramayya vs Lakshminarayanya* A I R 1934 P C 84 at p 86
5 *Muhummad Sulaiman vs Jhukkilal* (1888) 11 All 224 at p. 227.

jurisdiction, revenue laws are the most conspicuous These laws cover a wide field and provide for considerable encroachment on the jurisdiction of ordinary civil courts What is more is that cases under these laws are heard and decided by executive officers But these officers, while exercising judicial functions are known not only in popular parlance but are referred to in statutes[1] as Courts and appeals lie to the Privy Council from the decisions of the final revenue authorities in India Lord Campbell, in *Spooner vs Juddow*,[2] described them as "peculiar courts in which the questions of revenue are to be discused and decided" and compared their jurisdiction to the jurisdiction of the Court of Exchequer in England, As early as 1859, in setting aside a decision of the Special Commissioners of Revenue allowing a review petition made by the Government on insufficient grounds and beyond the limit of time prescribed by law, the Privy Coucil[3] observed "We believe that a decree of this tenor will be in strict conformity with the Regulations which have the force of law in India, and, at the same time, may contribute to ensure a just confidence that these special jurisdictions, which in some degree displace the ordinary tribunals of the country, will carefully observe those rules which have been prescribed to regulate their proceedings, rules which have been wisely introduced to guard against the possible abuse of authority and a depature from which would be likely to produce distrust, and to defeat the principal objects of their institution"

(C)—Other Special Jurisdictions

In spite of the considerable authority that the revenue courts exercise, affecting intimately the lives of millions in this country, they stand in the relationship of special jurisdictions to the ordinary courts of the land, A special jurisdiction can be created only by or under a law The determination of the question of extent of special jurisdiction, and consequently of ouster of civil court's jurisdiction, must rest on the terms of the particular statute creating the special jurisdiction, and decisions on other statutory provisions are not of material assistance except in so far as

1 e g Sec 5 C P C Revenue Judges come under the protection of Judicial Officers' Protection Act, 1850

2 (1850) 4 M I A 353 at p 380

3 *Maharaja Maheshur Singh vs The Bengal Government* (1859) 7 M I A 283 at p 310

general principles of construction are laid down "[1]

The fundamental principle is that if the special law interferes with the "common law rights" of the subject,[2] with his liberty or property[3] which is to be carefully guarded, it will be strictly construed[4] The court is reluctant to hold that the subject's right of access to it is barred, and it will jealously scrutinize any jurisdiction conferred on the executive bodies Where the language is ambiguous, a construction which will have the effect of transferring the determination of the question of liability from the courts of law to a board of executive officers will be rejected[5] No wider interpretation than is necessary will be given to any limitation of the powers of the Court[6]

But "where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions, as to rights which are the creation of that Act, then except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence In such a case there is no ouster of the jurisdiction of the ordinary courts for they never had any , there is no change of the old order of things , a new order is brought into being " On this principle it was held by Jenkins C J[7] that the validity of an election under the City of Bombay Municipality Act could only be determined by the tribunals appointed for the purpose by the Act and could not be questioned in the civil courts Ouster of civil court's jurisdiction was not expressly provided for by the Act under consideration Further the section of the old procedure code, which corresponded to Sec 9 of the present code, did not lay down, in so many words, that the court's cognisance could be impliedly barred Recently a very similar question has been

1 *Secretary of State vs Mask & Co* A I R 1940 P C 105 at p 110
2 *Balvant Ramchandra vs Secretary of State* (1905) 29 Bom 480 at pp 503-504
3 *Kamaraja vs Secretary of State* A I R 1936 Mad 269 at p 271, referred to in *Secretary of State vs Allu Jugannadham* A I R 1941 Mad (F B) 530 at p 532
4 *Brett vs Ellitya* (1869) 13 M I A 104 at p 109
5 *Winter vs Attoeney-General* L R 6 P C 378 at p 380 , followed in *Narayan Venku vs Sakharam Nagu* (1887) 11 Bom 519
6 *Raja Bhagwan Baksh Singh vs Secretary of State* A I R 1940 P C 82 at p 86
7 *Bhashankar Nanabhai vs Bombay Corporation* (1907) 31 Bom 604 at p 609

decided by the Privy Council.[1] The Sea Customs Act, 1878 provides for appeal and revision from the decisions and orders of officers of customs, to the higher executive authorities (Secs 188 and 191) and does not expressly oust the ordinary courts's jurisdiction The Privy Council, reversing the decision of the Madras High Court, held that when the statutory right of appeal had actually been exercised, the question was not cognisable by the ordinary courts and approved of the following observations by Willes J "Where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it with respect to that class it has always been held, that the party must adopt the form of remedy given by the statute" Their Lordships left open the question, "whether, prior to taking such appeal under Sec. 188, the aggrieved parties would have been entitled to resort to the civil courts or whether they would have been confined to the right of appeal under Sec 188"

An Act, creating a special tribunal out of the ordinary course, may give it power to decide the facts which give it jurisdiction, or it may merely lay down the conditions which give rise to the jurisdiction "Where the authority is to be satisfied as to the existence of the conditions precedent to the exercise of its powers, jurisdiction of courts is ousted But where the test is, what is the actual fact, the courts have jurisdiction to decide whether the fact exists or not"[2]

An instance of the former class is to be found in *Raja Bhagwan Baksh Singh vs Secretary of State*[3] The case was under the United Provinces Court of Wards Act 1912 which provided for the declaration by the Local Government of a proprietor as "disqualified", (which had the effect of bringing the estate under the management of the Court of Wards) and further provided that such "declaration shall not be questioned in any civil court" But before such a declaration could be made the Local Government was under the statutory obligation to furnish the proprietor with a detailed statement of the grounds on which it was proposed to disqualify him and to give him an opportunity of showing cause why such declaration should not be made The Privy

1 *Secretary of State vs Mask & Co* A I R 1940 P C 105

2 *Balvant Ramchandra vs Secretary of State* (1905) 29 Bom 480 at p 506

3 A I R 1940 P C. 82,

Council observed that 'the proviso itself requires the satisfaction of the Local Government, not that of a court, and it is, in their Lordships' view, unlikely that a decision solemnly come to by the Governor-in-council after full inquiry and when declared by the Act to be final, should thereafter be subject to review by the local courts of the Province"

Balvant Ramchandra vs Secretary of State[1] is one of the leading cases in the second category In this case the question was whether the court could go into the question whether a particular land was forest or waste land Section 3 of the Indian Forest Act, 1878, runs thus "The Local Government may constitute any waste or forest land into a reserved forest" It was decided that the section does not make the exercise of the power conferred depend on the opinion or decision of the Local Government but upon a question of fact "The test is not what appears to the Local Government to be, but what is, the actual fact And as the enabling section gives the Local Government no power to decide that fact, it can only be decided by recourse to the courts which have authority finally to decide on questions of law and fact wherever their jurisdiction is not expressly barred by the legislature"

If the statute, creating a special jurisdiction, makes that jurisdiction subject to the superintendence of the higher courts, there is no ouster of jurisdiction of the ordinary courts The effect of such a provision is that the same courts are to be approached through a different channel[2] So long as the statute provides for decision by a civil court, it is immaterial whether the civil court is approached by means of a suit or by an appeal or petition[3] To allow a general right of suit in such cases may often lead to absurdities Where the Madras Local Boards Act, 1920, gave the right of applying to the District Court against an order imposing a surcharge, the High Court[4] observed "If the respondent's contention were to be accepted, it would mean that he could apply to the District Judge to cancel the order

1 (1905) 29 Bom 480

2 *Balvant Ramchandra vs Secretary of State* (1905) 29 Bom. 480 at p. 510

3 *Kamaraja Pandiya vs Secretary of State* A I R 1936 Mad 269 at p 272

4 *Secretary of State vs Allen Jagannadham* A I R (1941) Mad 530 (F B) at p 532.

of surcharge and direct the refund of the money which has been paid, and if the District Judge decided against him, he could then file a suit in the District Munsif's court and ask the District Munsif to decree what the District Judge had refused This is absurd on the face of it" In laws relating to the revenue and local bodies provision is usually made foa appeal or revision to the civil courts The question arose whether the District Judge, to whom the Land Acquisition Officer had referred, under Sec 18 of the Land Acquisition Act, 1894, a claim for compensation, acted as a court or a *persona designata* It was decided by a Full Bench of the Allahabad High Court[1] that the reference was to a court subordinate to, and subject to the revisional jurisdiction of, the High Court

(D)—Principles for controlling special jurisdictions

If a special tribunal, of whatever nature, exceeds the statutory limits of its jurisdiction, its acts are ultra vires and illegal, and the general jurisdiction of the ordinary courts can be invoked to make a declaration to that effect This principle was enunciated by the Privy Council in *Secretary of State vs Fahdunnissa Begum*[2] The facts of the case were thus shortly put up by their Lordships[3] "The Board of Revenue, in violation of the right solemnly secured to the owner of a permanently settled estate, claimed to subject his land to an additional assessment, a claim which has been declared by legislation to be wholly illegal and invalid Thereupon the owner exercises the right conferred upon him by the Regulation of 1819, and appeals by suit to the court of judicature to reverse the decision of the Revenue authorities In bar of this suit the answer set up is that a subsequent law (Act IX of 1847) empowers the Revenue authorities to assess by new machinery, land of a description within which the land in question does not fall, and makes the orders of the Board of Revenue thereupon final" On the point raised their Lordships gave their decision in the following terms "The provisions contained in cl 31 of the Regulation of 1819 are in no way repealed or affected by the Act of 1847 If it had been intended to take away the power to obtain immediate redress by application to the courts, it

1 *Makhanlal vs Secretary of State* A I R 1934 All 260 (F B)
2 (1889) 17 Cal 590 P C
3 Ibid at p 605

would have been done in express terms and not by such enactments as are contained in the Act of 1847. The action of the Revenue authorities, was, therefore, in their Lordships' opinion wholly illegal and invalid Their Lordships cannot hold that the Board of Revenue can, by purporting to exercise a jurisdiction which they did not possess, make their order upon such a matter final, and exempt themselves from the control of the civil court"

In another [1] case, involving a similar question their Lordships observed that the protection from the jurisdiction of the civil courts, provided for in the revenue statute, was available "only in cases where sale is authorised, although it may be attended with some irregularity or illegality" and not in cases of entire absence of jurisdiction The principle is applicable to all special jurisdictions Thus where a Municipal Act provided for appeals against taxation and further barred objection to any valuation or taxation and questioning of liability of any person to be assessed or taxed except in the manner or by the authority provided for in the Act, yet, when the taxation itself was found to be ultra vires as being in excess of the jurisdiction conferred on the Municipality by the Act, a Full Bench of the High Court at Lahore,[2] overruling a former decision of a Division Bench of the Court, decided that the Court had jurisdiction to give appropriate relief to the aggrieved subject Similarly where a Debt Conciliation Board dealt with a "debt" which was not covered by the definition of the term given in the statute, the Board's decision was held to be *coram non judice* and of no effect whatever [3] Again where a certificate officer, purporting to act under the Bengal Public Demands Recovery Act, actually sold attached property two months before the date mentioned in the sale proclamation issued under the Act, the Calcutta High Court[4] held that it was not a case of exercise of jurisdiction with irregularity but a case of absence of jurisdiction entitling the Court to give relief

Where the statute provides for the creation of a special jurisdiction but no machinery is set up for the exercise of that jurisdiction, the ordinary court's general jurisdiction

1 *Balkrishna vs Simpson* (1898) 25 Cal 833 P C at p 842
2 *Municipal Committee vs Sant Singh* A I R 1940 Lah 377 (F B) overruling A I R 1935 Lah 970
3 *Lachman Sing vs Natha Sing* A I R 1940 Lah. 401 F.B. at p 407
4 *Tikendrajit vs Mrityunjoy* A I R 1940 Cal. 554.

prevails In *Lachmi Chand vs Ram Pratap*,[1] the Full Bench of the Patna High Court had before them what was in effect an election petition The provincial statute had provided for the creation of an election petition court, but no such court had actually been set up by the Government The judges unanimously held that the civil court's jurisdiction remained

Even while acting within the statutory limits a special tribunal is subject to the control of the courts where "it has not acted in conformity with the fundamental principles of judicial procedure "[2] Thus where a returning officer rejected the nomination paper of a candidate for a municipal election without making any real enquiry at all, it was held[3] that he had not exercised the jurisdiction that was vested in him and that his arbitrary decision had not only taken away the right of the candidate to stand for election, but had also deprived the electors of the exercise of their right in choosing their own representative But it does not matter at what stage the enquiry takes place provided there is an enquiry In *Income Tax Commissioner vs Mahaliram Ramjidas*,[4] the Privy Council had before it the question whether there should be a quasi-judicial enquiry before notice is issued to the assessee for the return of the income that had escaped assessment Overruling the Calcutta High Court their Lordships held that on the construction of the section [5] no such enquiry was necessary but pointed out that such an enquiry would follow the submission of the return in which the assessee would have the statutory right to appear and to produce evidence "Therefore a construction of Section 34" their Lordships proceeded "which requires a quasi-judicial enquiry to be held before the powers under that section can be operated would result in mere duplication of procedure, and in two enquiries of the same kind, into the same matter conducted by the same official, and without any advantage to parties "

Where a decision by a special tribunal has been obtained by fraud or collusion or in some cases even thru negligence,

1 A I R 1934 Pat 670 (2)
2 *Secretary of State vs Mask & Co* A I R 1940 P C 105 at p 110
3 *Kali Prasad Sing vs Mukutdhari P Sing* A I R 1933 Pat 155 at p 158 See also *Devrajakamani vs Hindu Religious Endowments Board* A I R 1941 Mad 878, where an order of the Board was set aside as arbitrary and in abuse of its powers
4 A I R 1940 P C 124
5 Section 34 Indian Income Tax Act 1922

the civil courts will interfere to give relief A certificated guardian represented certain minors in partition proceedings before revenue authorities, and a partition was effected On attainment of majority one of the the minors challenged the decision in a civil court alleging negligence of the guardian in protecting minors' interests in the Revenue Court The question was whether the civil courts had jurisdiction The majority of the Full Bench of the Allahabad High Court[1] decided the question in the affirmative Sulaiman J said "The remedy of the minor, if any, can be only by a separate suit The suit for avoidance of a previous order of a competent court is undoubtedly one of a civil nature and falls within the scope of Sec 9 Civil P C Such a suit is maintainable in a civil court If a review of judgment by the Revenue Court is not permitted, there is no reason why remedy by way of a fresh suit in the civil court should not be allowed "

Any statutory authority must exercise its powers not only within the letter of the law but also honestly and with due care While dealing with the qestion of an exparte assessment of income tax, which the law required to be made "according to the best of the officer's judgment", the Privy Council[2] observed "The Income Tax Officer when he makes an exparte assessment is to make it to the best of his judgment He must not act dishonestly or vindictively or capriciously because he must exercise judgment in the matter" In *Gaekwar of Baroda vs Gandhi Kachrabhai*[3] the plaintiff's allegation was that since the making of the railway his land had been flooded in the rainy season due to the negligent manner in which the Railway works were constructed and maintained The claim was for damages for past wrongs and injunction to restrain further wrongs The defence contended that the statute[4] authorised the construction of all necessary embankment and actually protected the defendant from any claim connected with or arising out of negligent or defective construction and that plaintiff's only remedy was as provided by the statute and not by a separate suit, The Privy Council said "It is simply a waste of time to deal seriously with such contentions as these It has been determined over and over again that if a

1 *Mst Sumaj Fatima vs Mahmood Ali* A I R 1932 All 293 at p 302
2 *I T Commissioner vs Shop Badridas* A I R 1937 P C 133 at p 138
3 (1902) 27 Bom 344 P. C
4 Railways Act 1890

person or a body of persons having statutory authority for the construction of works (whether those works are for the benefit of the public, or for the benefit of the undertakers, or as is the case of a Railway, partly for the benefit of undertakers, and partly for the good of the public) exceeds or abuses the powers conferred by the Legislature, the remedy of the person injured in consequence is by action or suit, and not by a proceeding for compensation under the statute which has been so transgressed Powers of this sort are to be exercised with ordinary care and skill and with some regard to the property and rights of others They are granted on the condition sometimes expressed and sometimes understood —expressed in the Act of 1890, but if not expressed always understood—that the undertakers 'shall do as little damage as possible' in the exercise of their statutory powers"

When the plaintiff alleged that the defendant District Board was discharging passengers and cargo of their ferry boats on the plaintiff's private property injunction was issued to restrain the defendant The Calcutta High Court[1] relying on English decisions said "When the Crown grants a ferry and purports to declare the limits within which it is to run, the termini must be on places over which the public may have the right to embark or disembark And the whole question therefore is whether the Legislature, assuming that it is competent to convert all lands within such limits into highways, has, by what it has said in the Act, expressed any such intention There is very great difficulty in presuming in favour of any such intention Such conversion would in effect amount to confiscation of private property without a corresponding award of compensation, would be tantamount to a declaration in favour of the public of an incorporeal hereditatment over private property over which no such right accrued under the ordinary laws of the land Unless such intention is very clearly expressed no inference of such intention would be permissible"

The executive is bound to respect and obey a judicial decision even though the particular department is not before the Court as a party, for the Courts are King's Courts and a judicial decision is the Sovereign's Command Reading C J[2] said "This is the King's Court We sit here to administer

1 *Midnapore Dist Board vs Manmotho Nath* A.I R 1937 Cal 289

2 *Rex vs Speyer* (1916) 1 K B 595. See also remarks of Willes J in *London Corporation vs Cox* (1867) L R 2 H L 239 at p. 254

justice and to interpret the law of the realm in the King's name It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown" Justice Greaves[1] declared that the above statement is as apposite here in India as in the United Kingdom, and repelled the suggestion that the Provincial Government not being a party before the Court was not bound by any injunction that might be issued by the Court On a similar suggestion being made before the Board, the Privy Council[2] expressed its opinion in much more emphatic terms "But then it was asked" to quote from the judgement "—what would happen if the Collector ignored the order of the court ? What remedy would the appellant have if he had omitted to ask for specific relief against the Collector ? It is highly improbable that any officer of the Government would set the court at defiance It is impossible to suppose the Government would countenance such conduct as that But the remedy in such a case, if it did occur, would be simple enough Every order such as that which the appellant asks for carries with it liberty to apply On a proper application and on proper notice being given, it would be found that the arm of the court would be long enough to reach the offender whatever his position might be" The above sentiments were echoed by the Federal Court in a very much more recent case[3] In view of the fact that the Federal Court can give only declaratory judgments[4] affirmation of the principle by the Court is remarkable

It has not been necessary for courts in India, so far as reported cases show, to reach out this long arm, and therefore it is not possible to say what it would be like But recent cases show that power to commit for contempt is an effective weapon in the armoury of the High Courts in India, and may well be utilised for the purpose should occasion arise It has been used to test the validity of arrest within the court compound immediately after release by the court,[5] to safeguard the right of the defence of a detained person in court[6]

1 *Manick Chand vs Corporation of Calcutta* (1921) 66 I C 600 at p 602
2 *Robert Fischer vs Secretary of State* (1898) 22 Mad 270 (P C) at p 283
3 *The United Provinces vs The Governor-General in Council* 1939 F C R 124 at p 137 See also Shadi Lal C J's observations in *Kundanlal vs Emp* A I R 1931 Lah 473 at p 475
4 See Secs 204 (2) and 209 (1) of the Govt of India Act, 1935
5 *Niharendu Dutt Mazumdar vs A E Porter* A I R. 1945 Cal, 107
6 *Homi Rustomji vs Barg* A I R 1944 Lah 196,

and to ensure to the prisoner in jail full and free communication with court [1]

(E)—Means to control special jurisdictions.

The Superior Courts in England, and in particular the Court of King's Bench, possess and exercise superintending authority over inferior jurisdictions and enforce that authority by the issue of prerogative writs Of these the writ of habeas corpus ad subjeciendum is the most important It is a prerogative process for securing the liberty of subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody [2] Mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior court, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty [3] Prohibition is directed to an ecclesiastical or inferior temporal court which forbids such court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land [4] Certiorari is directed to the judge or other officer of an inferior court, requiring that the record of proceedings in some cause or matter depending before such inferior court shall be transmitted into the superior court to be there dealt with in order to insure that the applicant may have the more sure and speedy justice It also lies for removing the proceedings of judicial bodies for the purpose of quashing such proceedings [5]

No court in India has the power to issue prerogative writs,[6] except the Presidency High Courts of Calcutta, Bombay and Madras and that also to a limited extent This power they derive as successors to the Supreme Courts in the Presidencies [7] The power to issue the writ of habeas corpus

1 *Balakrishna Narayan Saoji vs Col Jatar* 1945 F L J 73 (H C)
2 Laws of England (2nd Edition) Vol 9 p 701
3 -do- 744
4 -do- 819
5 -do- 838 and p 844
6 See *Gopal Marwari vs Emp* A I R 1943 Pat 245 at pp 261 ff (certiorari) *Dattatraya Vishnu Bapat vs Registrar Co-operative Societies* A I R 1941 Nag 382 (Certiorari) *Surajmall Brijlal vs Commr of Income Tax* 1930 Pat 538 (Mandamus)
7 For history of the succession see *Ryots of Garabando vs Parlakimedi* A I R 1943 P.C 164 at pp 168-78

at common law has however been taken away by legislation and powers conferred by sec 491 of the Criminal Procedure Code substitued [1] This section empowers all High Courts to issue directions of the nature of habeas corpus The power to issue the writ of Mandamus has been taken away by sec 50 of the Specific Relief Act, 1877, and a power has been conferred instead,by secs 45 and 47,to issue a peremptory order to do or forbear from doing a specific act This power, however, is confined to the three Presidency High Courts only These can still issue the writ of certiorari in the exercise of their local jurisdiction [2] The Privy Council laid it down in a later case[3] that the question of jurisdiction must be regarded as one of substance and that the mere location within the Presidency town of a statutory body like the Board of Revenue does not give the High Court jurisdiction over a dispute as to revenue in the mufussil finally decided by the Board [4]

For the vast majority of the people living outside the local jurisdiction of the Presidency High Courts, the procedure available may be stated in the words of Privy Council[5] as follows "Unless taken away by special enactment, there is a prima facie right in any person aggrieved by an order made in excess of jurisdiction to challenge it by a suit in the ordinary civil court—subject, as regards specific relief, to the terms of the Specific Relief Act (1 of 1877)—but if this right has been taken away by the Legislature in any case in which the Board of Revenue or any other body exercises judicial functions it may well be that the only method of challenging a judicial determination on the ground of jurisdiction is by appeal to His Majesty in Council "[6] The question of procedure in obtaining relief in the matter of an unjustifiable order passed by a special jurisdiction outside the Presidency town came up before the Calcutta High Court within a few years of its establishment A petition was presented to the

1 *C P Matthen vs Dist Magistrate* A I R 1939 P C 213 approving the observations of Rankin C J in *Gurindranath Banerji vs Surendranath Pal* (1927) 102 I C 637

2 *Annie Besant vs Advocate-General* (1917) 52 I C 206 P C at p 215

3 *Ryots of Garabado vs Parlakimedi* A I R 1943 P C 164 at p 178 See also *Raghunath Keshav vs Poona Municipality* A I R 1945 Bom 7

4 *Ryots of Garabandho vs Parlakimedi* A I R 1943 P C 164 at p 179

5 As in the case of Martial Law Commissions in the Punjab See *Bugga vs Emperor* (1920) 56 I C 440 P C also *Kalinath Roy vs Emperor* (1920) 59 I C 641 (P C)

court asking for an order restraining the Court of Wards from interference in the bestowal in marriage of a minor Jackson J [1] made the following observations "The court cannot interfere in the present stage of the proceedings in as much as it has no jurisdiction of this kind over the Court of Wards, whether the Court of Wards is acting with or without jurisdiction the proper course for the parties aggrieved in this matter to take is, in the first instance, to apply to the Board of Revenue for an order restraining (the Court of Wards) and in the next place to take proceedings in the civil court to try the right of the Court of Wards to interfere in the matter, in the meantime obtaining an injunction Possibly it may also be desirable to apply in the usual way and to the proper authority to have a guardian appointed to this young lady If, on either of those applications to the civil court, the parties think that they have any reason to complain, they can come to this court on appeal"

Generally proceedings of this nature in the ordinary civil court take the form of a suit for declaration Sec 42 of the Specific Relief Act, 1877, provides for the institution of a suit by any person entitled to any legal character or to any right as to any property against any person denying or interested to deny his title to such character or right for a declaration that he is so entitled It makes the grant of relief discretionary with the court, and enjoins on the plaintiff to seek further relief than a mere declaration when he is able to do so Whether there is any right of declaratory suit outside the terms of the section has occasioned conflict of opinion in the Indian High Courts [2] This has been due to the apparently contradictary decisions of the Privy Council in *Sheopersan Singh's*[3] and *Kathama Natchiar's Cases*[4] on the one hand and *Fischer's Case*[5] on the other, In the first two cases it was held "that the court's power to make a declaration without more is derived from sec 42 of the Specific Relief Act and regard must therefore be had to its precise terms" From the language used in the judgment in the last case it has been inferred that sec 42 of the Act is not

1 *Babu Gujadhur Pershad Narain Singh* (1866) 5 W R Misc 41

2 See for instance *Vaktuba vs Agarsinghji* (1910) 34 Bom 676 at p 680 for the negative view and *Secretary of State vs Subba Rao* A I R 1933 Mad 618 for the affirmative view.

3 *Sheoparsan Sing vs Ramnandan Sing* (1916) 33 I C 914 (P C)-

4 *Kathama Natchiar vs Dorasinga Tevar* (1875) 23 W R 314 (P C)

5 *Robert Fischer vs Secretary of State* (1899) 22 Mad. 270 (P C).

exhaustive of the cases in which courts in India can make decrees merely declaratory

The subject of the appeal *Kathama Natchiar's Case* was the declaration of the two Indian courts that the plaintiff was the next in succession to the Shivagunga Zamindary The expressed purpose of the litigation in *Sheoparsan Sing's Case* was to obtain a declaration that the plaintiffs were the next reversioners to the estate of Babu Bachu Sing according to Hindu Law, and as such, entitled to apply for a revocation of probate *Fischer's Case* had reference to an order of the Government of Madras by which the Collector of Madura was directed to cancel the separate registration of a certain village belonging to the appellant known as Kondagai and formerly part of the Zamindari of Shivaganga Under the relevant statute (sec 50 of Madras Act 1 of 1867) the only remedy available was by a suit in the civil court The rights of the parties depended on the validity of the Government order, which was therefore directly in question,

The plaintiff in *Fischer's case* prayed that the order complained of might be declared ultra vires and illegal and of no binding effect on the plaintiff The argument of the counsel for the Secretary of State was directed to show that the suit was demurrable in consequence of the provisions of the Specific Relief Act relating to consequential relief in a declaratory suit Their Lordships said in their judgment[1] "Now in the first place it is at least open to doubt whether the present suit is within the purview of sec 42 of the Specific Relief Act There can be no doubt as to the origin and purpose of that section It was intended to introduce provisions of section 50 of the Chancery Procedure Act of 1852, as interpreted by judicial decision Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer But the present suit is one to which no objection could have been taken before the Actof 1852 It is, in substance, a suit to have the true construction of a statute declared and to have an act done in contravention of the statute, rightly understood, pronounced void and of no effect That is not the sort of declaratory decree which the framers of the Act had in their mind But even assuming that the Specific Relief Act applied to such a suit as this what is the result? What further relief can be required? If the so-called cancellation is pronounced void the order of the

1 22 Mad at p 282 and p 283

Government falls to the ground and the decision of the Collector stands good and operative as from the date on which it was made Their Lordships are of opinion that the Government have been wrong throughout, and that the suit is properly framed and not open to objection under the Specific Relief Act "

In a recent case in the High Court at Calcutta[1] an attempt has been made to explain the apparent conflict in the Privy Council decisions "It would seem" proceeds the judgment "that the expressions 'merely declaratory decree' and 'declaration without more' used in the Privy Council judgments in *Kathama Natchiar's Case* and *Sheoparsan Sing's Case* refer to a declaration which merely serves to define rights, present or future, without giving present relief The power of the courts in India to make declaratory decrees in this sense is, under the above decisions, governed entirely by sec 42 of the Specific Relief Act But where a decree has the effect of giving present relief as well, the power to make it will be governed by the general provisions of the Code of Civil Procedure, e g sec 9 or order 7 rule 7 of the Code and not by s 42 of the Specific Relief Act Such a view would be consistent not only with their Lordships' obtions in the above two cases but also in *Fischer's Case*"

A simpler explanation of the conflict, it it submitted, can be gathered from the following remark of the Privy Council in *Fischer's Case* "This is not the sort of the declaratory decree which the framers of the Act had in their mind " The framers of the Act had only questions relating to ordinary social and communal relationship in mind, as the illustrations to section 42 clearly demonstrate. They were not thinking of specifically providing machinery for the judicial control of the executive, or in the words of their Lordships, "for suits to have the true construction of the statute declared, and to have an act done in contravention of the statute, rightly understood, declared null and void " That relief the courts could and can always afford independently of the Specific Relief Act and their Lordships pointed out that "the present suit is one to which an objection could have been taken before the Chancery Procedure Act of 1852"—section 50 of which formed the basis of section 42 of the Specific Relief Act

1 *Md Manjurul Haque vs. Bisseswar Banerjee* A.I.R. 1943 Cal 361 at p 364.

To give a few recent illustrations Where the Collector had no authority to make an order under sec 9 Watan Act, as the conditions required to invest him with authority to make the order were wanting, a suit to set aside the Collector's order was held maintainable [1] So also a suit does lie to declare a municipal valuation, made in contravention of the statute, illegal and ultra vires [2] Where the Board of Revenue exceeded its powers under the law by dismissing the Karnam of a village, the court had jurisdiction to declare the Board's order void and of no effect [3] But the plaintiff should have proper status to claim the relief and should implead and bring before the court the proper parties Thus a ratepayer who is not a voter cannot impeach a municipal election, for not having any right as a voter there is no question of any denial of any right to him [4] So also the court cannot entertain a suit impeaching the decision of the Hindu Religious Endowments Board that the plaintiff was not entitled to certain honours, there being no question of any legal right or right to any property [5] Declaratory relief was refused in a case where the Collector, though a proper party, was not impleaded [6]

Since the introduction of the federal constitution, suits have been filed against Provinces for declarations that certain Acts of Provincial Legislatures were ultra vires In Patna High Court[7] though the issue was raised by the defendant in the written statement that the suit was not maintainable it was not pressed at the hearing, nor does it seem to have been pressed in the Federal Court[8] on appeal The question was before the Federal Court in a later appeal, but was left open [9] It is now before the Privy Council on appeal from the Federal Court

1 *Malappa vs Tukko* A I R 1937 Bom 307
2 *Surendranath Sen vs Mymensing Municipality* A I R 1934 Cal 673
3 *Secretary of State vs Subba Rao* A I R 1933 Mad 618
4 *Bhubanmohan Bosak vs Chairman Dacca Municipality* (1927) 103 I C 890
5 *Vanamalai vs Hindu Religious Endowments Board* A I R 1935 Mad 621
6 *Manapragada Swaminathi vs Krovvidi Suryaprakash Rao* A I R 1934 Mad 293
7 *Jhalak Prasad vs Province of Bihar* A I R 1941 Pat 306
8 *Hulas Narain Sing vs Province of Bihar* A I R 1942 F C 8
9 *Thakur Jagannath Baksh Sing vs The United Provinces* A I R 1943 F C 29 at p 35

The Specific Relief Act also provides[1] for suits for perpetual injunctions, within certain limitations, in order "to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication" The Act defines obligation as "including every duty enforceable by law" and the term covers all those things which it otherwise implies in its ordinary or legal parlance [2]

If injunction will issue to restrain abuse of power it will issue all the more readily when there is illegal use of power For instance the subject has a right not to be taxed illegally and the authority is under a corresponding obligation not to impose an illegal tax If therefore there is an illegal imposition of tax, the person aggrieved can ask for relief from court by the issue of an injunction [3] Where necessary, the court will issue a mandatory injunction for which provision has been made in sec 55 of the Specific Relief Act The question before Lahore High Court[4] was whether an injunction can be issued to a statutory body in those cases where section 45 of the Act does in apply Or in other words what remedy was open to those aggrieved who were not residing within the jurisdiction of the High Courts at Calcutta, Bomby and Madras It was observed "Some courts have taken the view that there is no power in a court of law to issue mandamus to any local authority beyond s 45 With all respect to the learned judges who have advanced that opinion I am inclined to the opinion that s 55 is independent of s 45 and that the extraordinary jurisdiction vested in the High Courts of judicature at Calcutta, Bombay and Madras does not in any way affect the jurisdiction vested in the civil courts in general by virtue of S 55 to issue mandatory injunctions to compel the performance of certain acts which the courts are capable of enforcing" After quoting fron an earlier case[5] the judgment proceeded, "A judgment of Holt C J which is quoted

1 Sections 62 to 56

2 *Montogomery Municipality vs Sant Sing* A I R 1940 Lahore 377 at p 385

3 *Montogomery Municipality vs Sant Sing* A I R 1940 Lahore 377

4 *Lahore Municipality vs Monnuddin* A I R 1941 Lahore 200 In this case all English and Indian authorities were exhaustively reviewed See also *Administrator Lahore Corporation vs Abdul Majid* A I R 1945 Lahore 85

5 *Strachey vs Cawnpore Municipality* (1899) 21 All 348 In this case it was pointed out that Sec 45 Specific Relief Act gave a summary remedy on an application whereas under Sec 55 a mandatory injunction could be given only as a decree in a suit.

at p 532 in 47 All 513[1] was based on the principle that where a legal right has been infringed, the law must provide a remedy and the only remedy open to the plaintiff was by an action at law If injunctions cannot be issued to restrain public bodies from conducting themselves in an objectionable or illegal manner, the result would be that the aggrieved party would be left without a remedy even if his legal rights were trampled under foot and that could not be the intention of the legislature that created such public bodies"

(F)—Courts-Martial

Courts-martial also are special jurisdictions vis a vis the ordinary courts which will restrain any excess of jurisdiction On a *habeas corpus* application the High Court will examine the legality of detention An allegation that the petitioner is not, within the meaning of the Army Act, a person triable by a court-martial will be examined In a recent case in the High Court of Lahore[2] the petitioner was a subject of an Indian State and was before the court-martial at Delhi on a charge of an offence committed outside British India The validity of Sec 41 of the Army Act, 1911 was challenged on the ground that it was ultra-vires the Indian Legislature which enacted it The Court carefully examined the contention, and came to the conclusion that the impugned section was intra vires, A certificate was given for further appeal to the Federal Court

But whether the ordinary courts will interfere to check abuse of jurisdiction e g violation of principles of natural justice, is a question that has yet to be authoritatively decided even in England

The cases in which ordinary courts have been asked to interfere with the courts-martial have been very few in India There is a chapter in the English Manual of Military Law on "Powers of Courts of Law in relation to courts-martial and officers" There is no corresponding chapter in the Indian Manual

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1 (1925) *Abdul Rahman vs Abdul Rahman* 87 I C 51 at p 55
2 *Burhanuddin vs Emperor*—reported in the Press in January 1946 See also *In re Conductor Beedham* A I R 1934 Lah 845

CHAPTER VIII

Right of Personal Liberty

We have so far been dealing generally with the question under what limitations the principle of rule of law operates in India We now come to the discussion of specific rights Where as in India, "rights of the subject depend upon that code of law which is now common law throughout the whole country,"[1] constitutional rights shade off imperceptibly into private rights, and it is not easy, if at all possible, to enumerate them Moreover as the constitutions with fundamental guarantees show, the idea of what is a constitutional right varies from age to age and from country to country It is instructive to compare the list of guarantees in the constitution of the United States of America,[2] inserted by the Ten Amendments of 1791, with that in the 1936 constitution of the United Soviet of Socialist Republics in Russia[3] The former provides for a society wedded to the principle of free enterprise and the latter for a society based on communism But there is a common ground between the two lists and the highest among rights common to both is the right to personal liberty The American constitution declares that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated" By Article 127 of the Russian Constitution "citizens of the U S S R are guaranteed inviolability of the person"

In England there is no fundamental guarantee But there is the famous declaration in the 39th clause of the Magna Carta 'No free man shall be taken or imprisoned or dissezed or outlawed or exiled, or any wise destroyed, nor will we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land," which was later supplemented by the declarations in the Petition of Rights Both the Charter and the Petition are statutes of Parliament, but, in the words of Dicey "they are rather records of the existence of a right than statutes which confer it"

1 Per Rankin C J in *Girindranath Banerji vs Birendranath Pal* (1927) 102 I C 647 at p 653
2 See Munro's "The Government of the United States" p 99 ff
3 See Sydney and Beatrice Webb s Soviet Communism" pp 426-29

In India there is neither a fundamental guarantee as in America or Russia, nor a formal statutory declaration as in England The right in India is derivable from the complete subjection of the executive to law "The right to personal liberty" says Dicey "means in substance a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification" Within this meaning the right obtains in India, with the reservation that the law which justifies the restraint is not the law made by a representative Parliament but the law over the making of which the executive had complete control up to 1921 and has even to-day the decisive voice

(A)—Protection of Liberty

Dicey regarded the legal methods by which the exercise of the right is secured as a matter of even more consequence than the meaning of the right He went on to say that these methods are two fold namely redress for unlawful arrest or imprisonment by means of a prosecution or an action (i e civil suit) and deliverance from unlawful imprisonment by means of the writ of habeas corpus We have dealt with the first one of these remedies in an earlier chapter [1] We have now to examine the second one

Chapter 38 of the Criminal Procedure Code (as amended in 1923) provides for directions of the nature of a "habeas corpus" Sec 491 enacts "(1) Any High Court may, whenever it thinks fit, direct (1) that a person within the limits of its appellate criminal jurisdiction be brought up before the court to be dealt with according to law, (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty (2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section" Thus the right to get directions of the nature of a habeas corpus is statutory in India How such right differs from that under the common law and the Habeas Corpus Acts is best eramined by the comparison of two decisions of the Privy Council, one given in a case from Nigeria[2] and the other in a case from India [3]

The facts in the Nigerian case were that a native chief was ordered to remove himself from certain areas consequent

1 Chapter V—Equality before Law
2 *Eshugbayi Eleko vs Government of Nigeria* (1928) 113 I C. 273 (P C)
3 *Mathen vs District Magistrate* A. I R. 1939 P. C 213

on his being deposed and on his failure to obey was ordered to be deported to a certain town, Among other proceedings, the deposed chief took out a rule nisi for a writ of habeas corpus returnable before the Acting Chief Justice who heard and discharged it on technical grounds without going into the merits There was a second motion for a habeas corpus before the Acting Chief Justice who dismissed it upon the merits of the application Then yet another motion was made before another judge, Mr Justice Tew, who dismissed it on the ground that in view of the decision of the Acting Chief Justice, the motion could not be entertained On appeal the Full Court confirmed the order of Mr Justice Tew The applicant then further appealed to the Privy Council

The question before the Privy Council was whether applications for a writ of habeas corpus could be made to successive judges of the same court, "a question of law" said their Lordships "of grave importance to His Majesty's subjects in this country as well as in the overseas Dominions" Their Lordships rejected "the formidable body of judicial opinion" that was placed before them in support of the contention that the application could be made to all the courts in succession and not to all the judges in succession and said "If it be conceded that any judge has jurisdiction to order the writ to issue, then in view of their Lordships, each judge is a tribunal to which application can be made within the meaning of the rule and every judge must hear the application on the merits It follows that, although by the Judicature Act the courts have been combined in one High Court of Justice, each judge of that court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation, and that he is bound to hear and determine such an application on its merits, notwithstanding that some other judge has refused a similar application The same principle must apply in the case of the Judges of the Supreme Court of Nigeria" The appeal was accepted

On the authority of the Privy Council decision in the Nigerian case, and in professed exercise of the powers under the English law as to habeas corpus, Pandrang Row J of the Madras High Court alone ordered stay of execution of extradition warrants on the Directors of Travancore National and Quilon Bank The rules of the court required the application to be made before a Bench of two judges, and on an application to vacate his order he declared the Rules to

be ultra vires[1] A Full[2] Bench of five judges set aside the order as a nullity and as made without jurisdiction and held that assuming that the court had formerly the power to issue a writ of habeas corpus (under English law) that power had been taken away by statute and powers conferred by sec 491 Cr P Code substituted It was further held that the rules of the court were intra vires On appeal the Privy Council[3] confirmed the Full Bench's decision

The decision in the Travancore case overruled, among others, the decision of another Full Bench of the Madras High Court[4] This decision is remarkable as an instance of the 'noble energy," which Dicey so exultantly admires, of the judges in protecting the liberties of the subject Sec 491 of the Criminal Procedure Code as it then stood (i e before the 1923 amendment) authorised a Presidency High Court to issue directions of the nature of habeas corpus with respect to a person detained in custody within the limits of the Presidency town Outside those limits only a European British subject was entitled to an order in the nature of habeas corpus The question before the Court concerned detention of an Indian outside the limits of the Presidency town It was argued before the Full Bench that the High Court had no jurisdiction to issue the order prayed for The argument was rejected on the authority of *In the matter of Ameer Khan*[5] in which Norman J "in an able and illuminating judgment had held that a Presidency High Court had power to issue the writ of habeas corpus outside the Presidency town " In delivering the judgement of the court, Schwabe C J said 'The right which had been established (namely, issue of the common law writ to the mofussil) was a substantial right and it could hardly have been the intention of the legislature to take that right away by making rules of procedure or by giving adjective rights for the exercise of similar powers (i e,, in the cases of European British subjects) It is the sort of case where it can be fairly argued that if the Legislature intended to take away such an important right from the subject, it must use plain and unambiguous language To adopt such a construction of the Criminal Procedure Code would lead to this

1 *Crown Prosecutor vs Mammen Mappillai* A, I, R 1939 Mad 115
2 *District Magistrate vs Mammen Mappillai* A I R 1939 Mad 120
3 *Matthen vs District Magistrate* A I R 1939 P. C 213
4 *In re Govindan Nair* (1922) 68 I C 838
5 (1870) 6 B L R 392

absurdity, namely, that a European unlawfully imprisoned would have the right to obtain the writ in this court, while an Indian subject would have to go to the King's Bench in London for his remedy and there is a sound rule that where one construction leads to an absurdity and another does not the latter is to be preferred"[1] It was not brought to the notice of the court that soon after the decision in *Ameer Khan's* case the Legislature had intervened and section 82 of the Code of Criminal Procedure Code, 1872, had taken away in specific terms the power of the High Court to issue the prerogative writ outside the limits of the Presidency town It may be mentioned that in *Parlakimedi's Case*[2] the Privy Council has now decided, independently of any statutory prohibition, that the prerogative writ is limited within the area of the Presidency town

By the 1923 amendment of sec 491 Cr P Code the legislature has vastly extended the territorial limits within which protection of habeas corpus is available which now cover practically the whole of British India All High Courts are now empowered to issue directions in the nature of habeas corpus, and the monopoly of the Presidency High Courts in the matter is ended The word "High Court" has been statutorily given a liberal interpretation so as to include all courts of final appeal or revision, and not merely the courts established by Letters Patent Again appellate criminal jurisdiction has been substituted for ordinary original criminal jurisdiction Chief Justice Schwabe's judgment was overruled in 1939 when the 1923 amendment was the law At that time the applicant would have been entitled, under the amended section 491 Cr P Code, to substantially the same relief on the facts of the case as he got under the overruled judgment The inference is justified that the insistence of the judges to extend their jurisdiction to protect the subject's liberty (in ignorance, as it now turns out to be, of an old and obscure statutory provision) was a contributing factor to the liberalisation of the law

The scope of the protection given by section 491 was considered by a Full Bench of the Nagpur High Court[3] in what was described as "a case of first impression" The applicant before the High Court had originally been sentenced to two years' imprisonment but one year was remitted by a formal order issued in the

1 (1922) 68 I C 838 at p 840
2 *Ryots of Garabandho vs Parakimedi* A I R 1943 P C 164
3 *Venkatesh Yashwant vs Emperor* A I R 1938 Nagpur 513 (F B)

name of the Governor He was however detained in jail after his due date of release on the strength of a departmental memorandum to the Superintendent of the jail asking for such detention After the High Court had been moved for habeas corpus directions, a formal order cancelling the remission was passed in the name of the Governor The High Court ordered the discharge of the prisoner holding that even if the Government had any power of cancelling the order of remission, it could not be said to have been exercised by a departmental memorandum and that when the formal order was passed it was infructuous Vivian Bose J, in a separate concurring judgment, went in for a lengthy explanation of fundamental principles He said that Lord Herschell's statement in *Cox vs Hakes* that "the law of this country is very jealous of any infringement of personal liberty" applied to India He quoted Scrutton L J in (1923) 92 L J K B 797 at p 802 "The subject is entitled only to be deprived of his liberty by due process of law" and added "that applies here too" And he further quoted the following passage from (1916) 2 K B 742 as equally applicable to India "I do not agree that it is for the Executive to come and simply say 'The man is in custody and therefore the right of the High Court to interfere does not apply because the custody at the moment is technically legal' I say that the answer of the Crown will not do if this Court is satisfied that what is really in contemplation is the exercise of an abuse of power The arm of the law would have grown very short, and the power of court very feeble, if that were the case"

The protection of habeas corpus is available not only to the subject but to the foreigner owning temporary allegiance An application was recently moved in the Calcutta High Court[1] in the interests of a Greek sailor who had been deported by the police acting directly under the instructions of the Consul-General of Greece issued at the instance of the ship's agents The application proved infructuous as the sailor was not within the jurisdiction of the Court when the matter came before it and therefore could not be set at liberty. But Derbyshire C J used burning words of indignation in condemning the illegal procedure followed "Calcutta is a part of India There are still laws administered in the Courts of this country in spite of the various regulations and various pieces of legislation

1 *Leo Zepantis vs Emperor* A I R 1944 Cal 76

termed Emergency Legislation which have been passed The Greek Consul had no right in Calcutta to order his removal from Calcutta, the ship's agents had no right to order his removal from Calcutta, the police had no right to order his removal from Calcutta unless they did it under an authority from the Central Government or perhaps the Provincial Government or a proper court of law The Police had no such authority the Greek Consul had no such authority the ship's agents had no such authority In my opinion, this was a piece of lawlessness on the part of the ship's agents, the police and the Greek Consul I regret we are not in a position to help this man as he is out of the jurisdiction, but I hope this case will be a warning to those who are like-minded to take the law into their own hands where they have no right to do so"

In the Privy Council case of habeas corpus from India,[1] the applicants were in custody in the course of proceedings for being extradited to Travancore It was alleged that in reality the Travancore authorities desired to get the applicants into their jurisdiction in order to charge them with political offences, which would not be extraditable offences Their Lordships pointed out the remedies open to the applicants if the allegations proved to be well-founded, but stated that they could not be the subject of inquiry by the court on a habeas corpus application But where it was found that the Political Agent had no authority to issue the warrant, the offence having been prima facie committed within the British territory and not within the State territory, the extradition proceedings were quashed[2] Again where the procedure of the Extradition Act was not followed but a warrant was issued by a Magistrate within the State of Kalat and executed within the British territory by the magistrate to whom the warrant was sent direct, the arrested man was released on an application for habeas corpus,[3] on the ground that the warrant was illegal as being issued without jurisdiction

Alter Caufman's Case[4] is an early authority for the proposition that detention under an invalid warrant is

1 *Mathen vs District Magistrate* A I R 1939 P C 213

2 *Sandal Sing vs District Magistrate* A I R 1934 All 148

3 *Tahlram vs Emperor* A I R 1938 Sind 46 The Criminal Procedure Code was amended in 1941 by Act XIV of 1941 to provide for a simple procedure in like cases

4 *Alter Caufman vs Government of Bombay* 18 Bom 636

illegal The warrants in this case were issued under the Foreigners Act (III of 1864) and directed the persons named to remove themselves from British India by sea and also authorised all officers to whom the order was communicated to arrest and detain in custody the said persons in the event of disobedience It was held that the warrants were invalid for they contained the order of removal and also provided for arrest for the disobedience of the order at one and the same time without giving the persons named an opportunity to obey the order Further, removal by sea could not be ordered as the Act contemplated removal by a route in British India It was also pointed out that the warrants bore no seal The warrants were also held to be bad as the persons named were not indicated with sufficient certainty and particularity and their places of residence were not mentioned *In re James Hastings*[1] was relied on and the following passage from the judgment of Sir C Sargent was cited, "The issuing of general warrants, is, it is well known illegal—and a general warrant means a warrant to apprehend all persons committing a particular offence or class of offences (This warrant) is, however, of such a general nature as to justify the police to arrest any person of the name of James Hastings, whoever he may be or wherever he may be found, the number of persons to be liable to be arrested under it, being limited only by the limit to the number of persons bearing that name"

In *Shibnath Banerji's case*,[2] the Privy Council, having regard to the known and well settled principle of the English law that a discharge or an order directing discharge, under a writ of habeas corups is final and not subject to appeal considered the question of competency of appeal from an order of discharge under section 491 Cr P Code Their Lordships came to the conclusion that "as regards appeal, the position under the Criminal Procedure Code as to proceedings under sec 491 is in effect the same as the position stated in *Cox vs Hakes* in which it was held that the right of appeal given by section 19 of the Judicature Act did not include an appeal against an order of discharge made under a writ of habeas corpus" It has been held by the Allahabad High Court[3] that no appeal lies from an order under section

1 (1872) 9 B H C R 154 at p 159

2 1945 F L J 222

3 *Haidari Begum vs Zawad Ali Shah* (1933) 56 All 271 on appeal A I R 1934 All 606

491Cr P Code (whether of discharge or otherwise) even though it is passed by a single judge It was further held that the rules of the court barred applications to successive judges in the Allahabad High Court

(B)—Special Statutes

Dicey, it has been remarked, almost entirely excluded statute law from his consideration in his lectures In dealing with Irish Coercion Acts, he recognised that legislation can render the right to personal liberty nugatory In India champions of this right have had to contend not so much against the want of means of remedy but against the laws (which Vivian Bose J called "special statutes") which in terms take away the right itself Some of them also simultaneously take away or purport to take away the remedy of habeas corpus Section 491 itself has the proviso that directions under sub section (1) cannot be issued with respect to persons detained (without trial) under the Bengal State Prisoners Regulation, 1818, or Madras Regulation II of 1819 or Bombay Regulation XXV of 1827 or the State Prisoners Act 1850 or the State Prisoners Act, 1858 Norman J in *In Re Ameer Khan*[1] described the Bengal Regulation as "permanent suspension of Habeas Corpus" Periodically there have been spurts of special laws enacted to meet situations created by political movements Within living memory, apart from the emergency laws occasioned by the two world wars, there have been special laws during the Rowlatt Act agitation culminating in martial law regime in the Punjab, the non-co-operation and civil disobedience movements and revolutionary movements in Bengal Beaumont C J[2] thus described the effect of the Ordinances enacted to deal with the civil disobedience movement of 1932 "The principal Ordinance is that promulgated on 4th January 1932 Under that Ordinance, by S 4, Local Government, has power to issue directions as to the conduct of any person suspected of acting in a manner prejudicial to the public safety or peace Under sec 21 a person disobeying any order under sec 4 is punishable with imprisonment which may extend to two years or fine, the amount of fine not being limited. S 29 constitutes special courts for dealing with offences under the Ordinances S 32 lays down the procedure for those courts and directs that they are to follow the procedure prescribed by the Code of Criminal Procedure

1 6 B L R 392
2 *In re Pothan Joseph* A I R 1932 Bom 468 S B

for the trial of warrant cases by Magistrates Sec 34 provides that there may be an appeal in the case of any sentence passed by a Special Judge of death, or of transportation or imprisonment for two years or more Sec 51 provides that save as provided for in the Ordinance, no appeal lies from any order or sentence passed by a court constituted under the Ordinance and no court has power to revise any such order or sentence S 59 protects from liability in any civil or criminal proceedings persons acting under the Ordinance So that it really comes to this that there is no check upon the Government as to the persons they may regard as suspect, that orders may be passed affecting drastically the conduct of such persons, that heavy punishments may be imposed for the breach of any such orders, and that the right of appeal or application in revision, which would normally be enjoyed by any such person is very greatly curtailed This state of affairs is part of the Government established by law in British India for the the time being"

Where legislation seeks to cut down the protection of habeas corpus it must be given a limited construction The Federal Court[1] had before it in a recent case a war Emergency Ordinance The Ordinance[2] by section 10 (1) enacted that "no court shall have power to make any order under sec 491 of the Code of Criminal Procedure (II of 1898) in respect of any order (of detention without trial) made under or having effect under this Ordinance or in respect of any person the subject of such an order" It was held, overruling the decisions of Calcutta[3] and Patna[4] High Courts "The Court is and will be still at liberty to investigate whether an order now deemed to be made under Ordinance III was in fact validly made, in exactly the same way as immediately before the promulgation of the Ordinance If on consideration the Court comes to the conclusion that it is not validly made on any of the grounds indicated in any of the long line of decisions in England and in this country on the subject other than the ground that rule 26[5] was ultra vires s. 10 of Ordinance III will no more prevent it from so finding than s 16 of the Defence of India Act did Such an invalid order, though purporting to be an order, will not in fact be

1 *Basanta Chandra Ghosh vs King-Emperor* 1944 F C R 295 (316)
2 Restriction and Detention Ordinance III of 1944
3 *Jatindra Gupta & Others vs K E* (1944) 7 F L J 149
4 *Kali Prasad Upadhaya vs K E* 23 Pat 475
5 Reference is to Defence of India Rule 26 declared ultra vires by the Federal Court in *Keshav Talpade's Case* A I R 1943 F C 1

an order under this Ordinance or having effect under this Ordinance"

The above principle found support in the Privy Council decision given nearly a year later on the the point whether sec 16 of the Defence of India Act 1939, barred the consideration, on an application under sec 491 Cr P Code, of the validity of an order under Rule 26 framed under the Act Sec 16 enacted that "no order made in exercise of any power conferred by or under this Act shall be called in question in any court" Their Lordships[1] said "It assumed that the order is made in exercise of the power, which clearly leaves it open to challenges on the ground, that it was not made in conformity with the power conferred, heavily though the burden of proof may lie on the challenger"

In this very case their Lordships found that with respect to two of the applicants for habeas corpus the burden had been discharged, Rule 26 (which, over-ruling the Federal Court, the Privy Council held to be intra vires) enacted that a person could be detained if the Central Government or the Provincial Government "was satisfied with respect to that particular person that such detention was necessary to prevent him from acting in any manner prejudicial" to enumerated objectives As it was found that the orders of detention were passed in a routine course, it was held that presumption about satisfaction of the proper authority after applying his mind to the facts of the case did not arise and the detentions were declared illegal

Their Lordships, however, held it to be a typical case of presumption where the order was prima facie regular and signed by a responsible officer of Government and there was nothing on the record to show that the case had not been considered by the proper authority A judge of the Patna High Court[2] has, however, pointed out that in the leading English case[3] on this question of presumption, stress was laid by the House of Lords "on the control exercisable by the House of Commons on the Secretary of State entrusted with the exercise of the power of detention" This safeguard of inestimable value is not available to the subject in India "There is in the Indian Act" said Gwyer C J delivering the

1 *Emperor vs Shibnath Banerji* 1945 F L J 222 (P C) at p 229
2 Per Agarwala J in *Basanta Chandra vs Emperor* A I R 1945 Pat 45 at p 50.
3 *Liversidge vs Anderson* 1942 A C 206

judgment of the Federal Court in *Keshav Talpade's Case*[1] "no trace of an intention that any particular person or authority should exercise the power of detention On the contrary, the selection of those who are to exercise this most important and exceptional power is left to be decided by the Rules themselves (i, e by the executive which makes the Rules) The vast area of the Indian sub-continent, the wholly different problems of government which are to be found there, and the existence of eleven provinces in addition to the Central Government, besides other sub-ordinate governing authorities, no doubt made it a more difficult task to select in advance an individual or individuals in whom these powers might be vested, as was done in the United Kingdom, but so far as we can see, there is nothing in the Act to prevent these powers being vested in any body or persan, however insignificant or subordinate It is one thing to confer a powei to make a regulation empowering the Home Secretary to detain any person if he thinks it expedient to do so far a number of specified reasons , it is another thing altogether to confer a similar power on any person whom the Central Government may by rule choose to select, or the Central Government may by rule give powers for the purpose "

(C)—Right of Private Defence

The right of private defence against execution of illegal warrants or orders is, within well-defined limits, statutorily recognised in India (Secs 96 to 99 I P C) Such right extends to defence of body and property It is not available where the act is by a public servant or under the direction of a public servant, acting in good faith and under colour of office though the particular act being done may not be strictly justifiable by law There is no deprivation of the right of private defence, however, unless the affected party knows or has reason to believe that the act or the attempted act is by a public servant, or under his direction Good faith and colour of office do not protect the public servant from the exercise of the right where the affected party has reasonable cause to apprehand death or grievous hurt There is no protection where the question is not of mere irregularity in exercise of jurisdiction but want of jurisdiction This right

1 *Keshav Talpade vs Emperor* 1943 F. C R 49 at pp 65-66 The decision that Defence of India Rule 26 was ultra vires was over ruled by the Privy Council in *Emperor vs Shibnath Banerji* 1945 F L.J 222

has been successfully exercised against excise officers,[1] police constables,[2] court bailiffs,[3] revenue officers,[4] incometax officers[5] and others

(D)—Principles of Criminal Procedure Code

Speaking of the 'great statutory common law of India" Rankin C J[6] has remarked that the Criminal Procedure Code "enshrines the old principles" of the constitutional charters of England For instance, a police officer can arrest without warrant only on the stringent conditions prescribed by sec 56 of the Code The headnote of an early case[7] on this point reads "Exposition of a police officer's powers of arrest and detention of accused persons and witnesses, with a view to the suppression of the practice of torture" The facts of the case were that certain persons were detained by police officers on the suspicion of a crime of murder and were tortured with a view to extract confession In the course of the judgment the remark is made more than once that "if the existing provisions of the Code of Criminal Procedure Code were rigidly enforced (and we consider it is the duty of every judicial officer as well as of every police authority to see that this is done) such atrocities as these would be almost impossible" The judgment then proceeds "A police officer may arrest without the orders of a magistrate, and without warrant any person against whom *a reasonable* complaint has been made, or a *reasonable* suspicion exists of his having been concerned in the offence What is a reasonable complaint or suspicion must depend on the circumstances of each particular case, but it must be at least founded on some definite fact tending to throw suspicion on the person arrested, and not on mere vague surmise or information Still less have the police any power to arrest as they appear sometimes to do merely on the chance of something being hereafter proved against them Any wilful excess by a police officer of his legal powers of arrest is, by sec 220 of the Penal Code, an offence punishable by imprisonment for seven years"

1 *Idu Mandal vs Emperor* (1907) 6 C L J 753
2 *Bajrang Gope & Others vs Emperor* (1910) 15 C W N 343
3 *Allah Dad vs Emperor* (1923) 75 I C 731
4 *Reg vs Tulsi Ram* (1888) 13 Bom 168
5 *Achru Ram vs Emperor* (1925) 7 Lah 104
6 (1927) 102 I C at p 653 Col 1
7 *Queen vs Behary Singh & others* (1867) 7 W R Cr 3 (5)

If there is resistance to any arrest minimum force is to be used to overcome it, but such force should not cause death of a person who is not accused of an offence punishable with with death or with transportation for life[1] The Punjab Chief Court[2] had to deal with a case in which death had been caused, but it was sought to be justified under a special statute, Frontier Crimes Regulation, 1887, which by sec 37 had lifted the prohibition of the Code against causing of death The Sessions Judge had found that "as a matter of fact greater violence had been used than was necessary in the case," but held that the officers were protected by the Regulation The Chief Court over-ruled the decision of the Sessions Judge and held that the Regulation could not be "converted into a license to kill unnecessarily", and added "It is desirable that it should be known on the frontier that every police officer or other person who uses more force than is necessary in arresting an offender is responsible for so doing, and that while nervousness may account for the absence of due care and attention in jumping to a hasty conclusion in the presence of purely imaginary danger, the exercise of due care and attention is essential to establish a plea of mistaken belief in the existence of justifiable facts" Prosecution of offending police officials was ordered

After an arrest has been effected it does not rest with the discretion of the police-officer to keep the prisoner in custody where and as long as he pleases Section 61 of the Code enacts "No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable and such period shall not, in the absence of a special order of the magistrate under sec 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrgte's Court" Section 167 empowers only first class or especially empowered second class magistrates to remand an arrested person to police custody for a maximum period of fifteen days for reasons to be recorded in writing, and revisable by higher courts In *In re Khairati Ram*[3] the fact was that a magistrate on the grant of pardon to an approver had committed him to police custody Shadilal C J said "There is no authority to support the contention that the Magistrate tendering pardon has discretion to direct the detention of the approver either

1 See 46 (3) Cr P Code
2 *Mohd Azim vs Sawan & others* 32 P R 1894 Cr
3 A. I R 1931 Lah 476.

in police custody or in judicial custody The law views with disfavour detention in the custody of the police The provisions of the law (regulating detention in police custody) are most useful and necessary, and they should be strictly complied with by the subordinate courts The law is jealous of the liberty of the subject and does not allow his detention by the policy unless there is a legal sanction for it" In this case an attempt had been made to get over the restrictions as to detention in polic custody by a notification under sec 541 (1) of the Code authorising the confinement is of the approvers "in that portion of the Lahore Fort which in the occupation of the police" The Court held the notification bad in law as the section, under which the notification was issued, was not operative in places where there were prisons established under the Prisons Act, and further as it empowered the Local Government to prescribe a place for the confinement of the person mentioned therein and could not be invoked for the purpose of prescribing the custody in which he was to be kept

Chapter 39 of the Code deals with the right of an arrested person to be released on bail Sec 498 enacts "The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive," words reminiscent of the Bill of Rights, 1689 That the Indian law on the question of bail is practically the same as the English law was the conclusion arrived at, after an exhaustive examination of the case-law on the subject, by the Calcutta High Court in *Nagendranath Chakravarti vs Emperor* [1]

A lacuna in the law of bail has recently been pointed by the Privy Council [2] Where the Privy Council gives special leave to appeal in a criminal case, there is no provision for releasing the appellant on bail, pending the disposal of the appeal This decision overrules a large number of decision in which it was held that the High Court had the necessary jurisdiction in the matter

(E)—Contempt of Court

Contempt of court is one common law offence that obtains in this country In *Surendranath Benerji vs The Chief Justice and Judges of Bengal*,[3] the Privy Council said "Such an offence (i e. insult or libel upon the High Court

1 (1924) 81 I C 220
2 *Jamamdas vs Emperor* A I R 1945 P C. 94
3 (1885) 10 Cal 109 (P C)

or one of the judges thereof, imputing corrupton or misconduct or incapacity in the discharge of his public duties) is something more than mere defamation and is of a different character It is an offence which by the common law of England is punishable by the High Court in a summary manner by fine or imprisonment or both That part of the common law of England was introduced into the Presidency towns when the late Supreme Courts were established by the Charters of Justice The High Courts in the Presidencies are Superior Courts of Record and the offence of contempt and the powers of the High Court for punishing it are the same there as in this country, not by virtue of Penal Code for British India or the Code of Criminal Procedure, 1882, but by the virtue of the common law of England"

But the powers to punish for contempt are exercised by all the Chartered High Courts alike, whether in the Presidencies or outside them Wherefrom do the non-Presidency High Courts derive their powers? The question was raised and argued at length before the Lahore High Court[1] The Court held that it possessed the powers, and reliance was placed on a decision of the Allahabad High Court[2] But a careful reading shows that the Allahabad decision was itself based on the authority of the decisions of Presidency High Courts, and had, therefore, it is submitted, no bearing on the argument put forward In *the Hindustan Times Case*[3] the Privy Council had an appeal from a decision of a non-Presidency High Court In the decision of the Privy Council, jurisdiction of the High Court is assumed to exist and the point is not directly decided In enacting the Contempt of Courts Act, 1926, the Indian Legislature has also proceeded on the same assumption

The Federal Court is by statute a Court of Record, but it is not established by Letters Patent In *Gauba's Case*[4] Gwyer C J said "This Court being a Court of Record has all the powers which belong to such a Court including the power for contempts of itself and Sec 210 (2) (of the Constitution Act) does no more than give it the same machinery for making that power effective as the High Courts themselves"

1 *In the matter of Muslim Outlook* (1927) 103 I C 775 followed in *In re Lala Harkishan Lal* A I R 1937 Lah 497

2 *Hadi Hussain vs Nasiruddin Haider* (1927) 99 I C 108

3 *Debi Prasad vs K E* A.I R 1943 P C. 202

4 *K L. Gauba vs. Chief Justice & Judges of Lahore* 1941 F C R 54.

On this reasoning, it is submitted, not only the High Courts established by Letters Patent, but all other high courts, being final courts of appeal and revision within their respective jurisdictions, should have had the common law power over contempt of court as superior courts of record independently of the statutory provision now made by the Contempt of Courts Act But it was assumed, (as the statement of objects and reasons to the Contempt of Courts Act shows) that powers for contempt inhered in the High Courts which were established by Letters Patent and were not available to other high courts

Is it the prevalence of common law in a particular area that gives the High Court jurisdiction in matters of contempt? Then only the Presidency High Courts have got the jurisdiction, and all other High Courts whether chartered or otherwise (apart from statutory provision) have not got it Is it the fact that a High Court is constituted by Letters Patent that invests it with jurisdiction? Then all the chartered High Courts have got it and and non-chartered high courts, (again apart from statutory provision) have not got it Is the mere fact that a High Court is a Superior Court of Record gives it jurisdiction over contempt? Then all High Courts, whether Chartered or otherwise, whether within a Presidency or outside it, have got the jurisdiction There is high judicial authority for each one of the above propositions and the statutory provisions of the Contempt of Courts Act do not solve all the issues that arise For instance, if the Chief Court of Oudh derives its powers over contempt only from the Act, can it assume jurisdiction to punish for contempt of courts subordinate to itself? In a recent case[1] it assumed such jurisdiction on the ground of being a court of record Again if the fact of being constituted by Letters Patent gives a non-Presidency High Court common law jurisdiction to issue process in a contempt case, why on the same principle can it not issue prerogative writs under the same common law jurisdiction?

At Common Law the power to commit for contempt is arbitrary and unlimited[2] By the Contempt of Courts Act the power of punishment is limited to six months' simple imprisonment or fine of two thousand rupees or both This was enacted to over-ride the decision of the Lahore High Court in *Lala Harkishan Lal's Case*[3] in which it was held that imprisonment for contempt could be indefinite and

1 *Md Yusuf vs Imtias* A. I R 1939 Oudh 131 (F B.)
2 Halsbury 2nd edition Vol 7 p 3.
3 A I R 1937 Lahore 497.

unlimited The Act thus provides for punishment without defining the offence The need for such statutory definition of the offence is established by the observations made by the Federal Court and the Privy Council in recent cases

In *Gauba's case*[1] the Federal Court expressed the opinion that "the law of contempt of court has at times been stretched very far in British India" In the *Hindustan times*[2] *case*, in which it was found by the Privy Council that the proceedings in contempt were misconceived, their Lordships observed "The case of contempt which consists of 'scandalising the Court itself' are fortunately rare, and require to be treated with much discretion No doubt it is galling for a judicial personage to be criticised publicly as having done something outside his judicial proceedings which was ill-advised or indiscreet But judicial personages can afford not to be too sensitive If a judge is defamed in such a way as not to affect the administration of justice he has the ordinary remedies for defamation if he should feel impelled to use them" In a later case[3] it was observed "Their Lordships would once again emphasise what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases It is a power which a Court must of necessity possess, its usefulness depends on the wisdom and restraint with which it is exercised"

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1 *K L. Gauba vs The Chief Justice & Judges of Lahore High Court* 1941 F C R 54
2 A I R 1943 P C 202
3 *Shamdasani vs. Emperor* A I R 1945 P.C. 134.

CHAPTER IX

Right of Free Discussion

All constitutions with fundamental guarantees profess alike to protect freedom of discussion The first Amendment of 1791 to the American Constitution imposes the ban on the Congress against making any law "respecting any establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press" Enacted a century and a half later, under the influence of exactly the opposite ideology, the Russian Constitution of 1936 guarantees the citizens of the United Soviet of Socialist Republics "freedom of speech and freedom of press"

In England this freedom flows from the doctrine that a man may say or write any thing so long as it does not contravene any law Dicey mentioned the laws of libel, blashphemy and sedition as defining the bounds of such freedom Other writers have pointed out the Obscene Publications Act, 1857, Official Secrets Act, 1911 to 1920, Incitement to Disaffection Act, 1934, as other laws which the subject must not transgress Together they form a considerable volume which can be rigorously applied whenever expedient, thus potentially limiting freedom all the time and inevitably limiting it in an emergency "The important question," a leftist writer[1] says, "is simply this Who decides and in whose interests ? Freedom is limited by the aims of the particular state and those whom it serves"

In India the ordinary law, (leaving special statutes out of consideration), is practically the same as in England The criminal law is statutory, and the Indian Penal Code has got chapters treating of offences against the state and public tranquility, of offences relating to religion, of offences affecting decency and morals and of defamation On the Indian statute-book are Official Secrets Act (19 of 1923) and Police (Incitement to Disaffection) Act (22 of 1922) In addition there are laws enacted to fulfil the obligations of the Government to the Indian States and the States on India's boarders viz Indian States (Protection) Act (11 of 1934), and Indian States (protection against disaffection) Act (10 of 1922)

The aim of the State in India has been so far pre-

1 Pat Sloan Russia without illusions p 189.

servation of the foreign rule It is no wonder that to the uncritical the rigorous application of the ordinary law, supplemented by enforcement of special laws on much too frequent occasions, have appeared to be complete denial of liberty of opinion to the subject in India There can be no more cherished right for a subject nation than its right to criticise the ruling power and to assert its claim to independence A foreign ruling power has got, in the very nature of things, to curtail this right severely This almost irreconcilable conflict between the interests of the rulers and the ruled is reflected in the entire Indian case law on sedition up to 1942 when the Federal Court decided *Niharendu Dutt Mazumdar's Case* [1]

(A)—The Law of Sedition

The law of sedition is codified in sec 124A of the Indian Penal Code In the terms of the section, sedition may be defined as "bringing or attempting to bring into hatred or contempt or exciting or attempting to excite disaffection (including disloyalty and all feelings of enmity) towards His Majesty or the Crown Representative or the Government established by law in British India by words, either spoken or written, or by signs, or by visible representation or otherwise" By explanations to the section exception is made of "comments expressing disapprobation of the measures of the government with a view to obtain their alteration by lawful means or of the administrative or other action of the government provided that such comments are made without exciting or attempting to excite hatred or contempt or disaffection" These explanations were added to remove any doubt as to the true meaning of the legislature, they do not add to or subtract from the section itself [2]

"The language of Sec 124A of the Penal Code," the Federal Court has remarked, "if read literally, even with the explanations attached to it, would suffice to make a surprising number of persons guilty of sedition" Though the language has been adopted from English law yet "it is to be remembered that in England the good sense of jurymen can always correct extravagant interpretations sought to be given by the executive government or even by the judges themselves" "Freedom of discussion in England" Dicey has said "is little else than the right to say anything which a jury consisting of twelve shop-keepers think it expedient should

1 *Niharendu vs King Emperor* 1942 F C. R 38
2 Ibid at p 48

be said or written" "If in this country that check is absent or practically absent" the Federal Court judgment proceeds "it becomes all the more necessary for the courts to put themselves so far as a possible in the place of a jury, and to take a broad view, without refining overmuch, in applying the general principles which underlies the law of sedition to the particular facts and circumstances brought to their notice"

Defining the general principle of the law of sedition, Gwyer C J,[1] delivering the opinion of the Court observes "The first and most fundamental duty of every government is the preservation of order, since order is the condition precedent to all civilization and the advance of human happiness This duty has no doubt sometimes been performed in such a way as to make the remedy worse than the disease, but it does not cease to be a matter of obligation because some on whom the duty rests have performed it ill It is to this aspect of the functions of Goverment that in our opinion the offence of sedition stands related It is the answer of the State to those who, for the purpose of attacking or subverting it, seek to disturb its tranquility, to create public disturbance and to promote disorder, or who incite others to do so Words, deeds, or writings constitute sedition, if they have this intention or this tendency, and it is easy to see why they may also constitute sedition, if they seek, as the phrase is, to bring Government into contempt This is not made an offence to minister to the wounded vanity of Government but because where Government and law cease to be obeyed and no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that is their intention or tendency"

His Lordship concludes the observations on this aspect of the case with the following words "We believe that, if the essential principles which we have sought to enunciate above are borne in mind, and if the courts, as we have suggested, assume in part the functions of juiymen when they hear these cases, they will be generally be able to come to a decision not only in harmony with the true principles of law, but also not obnoxious to commonsense and the circumstances of the time"

1 Ibid at pp 49-50

On similar facts in a case before the Bombay High court,[1] the accused relied on the Federal Court decision The Crown counsel, on the other hand, relied on the earlier decisions of Indian High Courts, some of them later approved by the Privy Council,[2] in which it was held that an incitement to violence was not a necessary ingredient to an offence under section 124 A After reviewing the authorities Wadia J said "If we were to apply these principles to the case before us the accused's act would amount to an offence In the judgment of the Federal Court, however, a different view has been taken The learned Advocate-General asks us to hold that the view taken by the Federal Court is in conflict with the view expressed by the Privy Council on more than one occasion and is not binding on us I am not prepared to do so Under Sec 212 Government of India Act, 1935, the decisions of the Federal Court are binding on us The Privy Council decision in 22 Bom 528[3] is more than 45 years old and that in 43 Mad 146,[4] 23 years old The decision of the Federal Court was given after full consideration of the changes in the law of sedition which have taken place in course of time" Weston J in a concurring judgment said "If these decisions are at variance, resolution of the conflict lies with one or other of those tribunals" Both in the Federal Court and Bombay cases, sec. 124A did not come in directly for interpretation but a rule framed under the Defence of India Act, 1939 which contained substantially the identical language In a case before the Lahore High Court[5] the question was forfeiture of security deposited under the Press Emergency Powers Act, 1931 on the ground of publishing an allegedly seditious leaflet headed as "Independence Day Pledge" The Special Bench, basing their opinion on the *Niharendu* decision, unanimously set aside the order of

1 *Emperor vs Sadasiva Narayan* A I R 1944 Bom 255

2 In *Annie Besant vs Advocate-General, Madras* (1919) 52 I C 209 (P C) the Privy Council approvingly referred to (i) *Q E vs B G Tilak* (1897) 22 Bom 112 (ii) *Q E Ramchander Narayan* (1897) 22 Bom 152 and (iii) *Q E vs Amba Prasad* (1898) 20 All 55 F B In 22 Bom 112 Strachey J directed the jury that "disaffection" meant ill-will in any form to the Government and stated that he agreed with the definition given in *Q E vs Jogendra Chandra Bose* (1891) 19 Cal 34 where the Chief Justice of Bengal had taken the word to mean 'absence of affection"

3 *B G Tilak vs Queen Empress* This is the decision of the Privy Council refusing leave to appeal from 22 Bom 112

4 52 I C 209 (P C) *Annie Besant's Case*

5 *Harkishan Singh vs Emperor* A I R 1946 Lah 22.

forfeiture No reference was made to the earlier decisions of the High Courts

It may be mentioned that though both the Central and Provincial Governments were represented before the Federal Court no application was made, either to the Federal Court or to the Privy Council, for leave to appeal to the Privy Council from the decision in *Niharendu's Case* From this it may be inferred that the Government have acquiesced in the liberal interpretation of the law of sedition which the Federal Court has put on it The law on the subject is now the same in India as in England [1]

India has got no state-religion[2] and there is no counterpart on the Indian statute-book to the English blasphemy laws But India is a land of many religions each one with a huge number of people deeply attached to it The Penal Code[3] as originally enacted provided for the punishment of following offences Injuring or defiling place of worship with intent to insult the religion of any class, disturbing religious assembly, trespassing on burial places etc and uttering words etc, with deliberate intention to wound religious feelings In 1927 in *Rangile Rasul*[4] case it was decided that polemics against a deceased religious leader, however scurrilous and in bad taste such attacks might be, were not punishable in law The Legislature intervened to fill up the lacuna by enacting sec 295 A But in an Allahabad Case,[5] the Lahore decision was expressly dissented from and it was held that such attacks fell within the mischief of Sec 153 A which provides for punishment of promotion or attempts at promotion of feelings of enmity and hatred between different classes of Her Majesty's subjects What is a "class" within the meaning of the section has been the subject of much judicial deliberation It has been held that the division of classes may be on racial lines, like Europeans and Indians,[6] on religious lines, like Hindus and Muslims[7] or on economic lines like peasants and landowners,[8] workmen and millowners [9] In the *Zemindar Case,*

1 It is understood that leave has been granted for appeal to the Privy Council from A I R 1944 Bom 255

2 See *Vasudev vs Vamanji* (1880) 5 Bom 80 (81-2) 'In India there is no State Church It is the policy of the state to protect all religions and interfere with none"

3 Secs-295, 296, 297, 298

4 *Rajpal v K E* (1927) 28 P L R 514

5 *Kali Charan Sharma* (1927) 49 All 856

6 *Jaswant Rai* (1907) 10 P R 1907

7 *Chamupati* (1931) 13 Lah 152

8 *Munshi Singh* (1935) 10 Luck 712

9 *Ramalingyya* I L R. (1937) Mad 14.

the question before a Full Bench of the Lahore High Court[1] was whether the Police was a class or section of His Majesty's subjects The majority, Addison and Monroe JJ replied the question in the affirmative while Agha Haidar J dissented In his dissenting judgment his Lordship said "I would hold that the words 'class or section' in this context signify large portions of the population of His Majesty's subjects in British India and those portions should be determined not by any artificial or official designation but by some natural or spontaneous process where large masses of population are grouped into separate categories In other words, the expression refers to permanent and distinct elements of society which are to be found in the country and which exist and would continue to exist irrespective of any action of the Government" It is submitted that the majority decision stretches the law too far to the detriment of the subject's liberty

(B)—Freedom of Press

This is the age of the printed word and the measure of freedom of discussion in a country is the liberty that the Press has got under its laws This liberty in England means no extraordinary privilege for the Press and also no extraordinary penalties for the Press "The liberty of the Press" to quote from a recent decision of the Privy Council[2] in a case of contempt of court "is no more than the liberty of any member of the public to criticise temperately and fairly but freely any episode in the administration of justice" Dicey emphasised that such liberty implied absence of any license to print or censorship or a preliminary deposit

In India the Press has no special privileges but it works, under the law as it stands to-day, under a constant threat of drastic penalties

In *Channing Arnold's Case*,[3] an editor, on being charged with defamation of an official, had not proved his case under any of the ten exceptions to sec 499 I P C At the trial he had been specifically asked by the judge whether he wished to give explanation of his position in the case as to his bonafides etc and he had replied to the question in the negative On appeal to the Privy Council Lord Shaw observed "Their Lordships regret to find that there appeared on one side of this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distin-

1 *The Zamindar* A I R 1934 Lah 219
2 *Andre Paul vs Attorney-General* A I R 1936 P C 141 at p 146
3 *Channing Arnold vs Emperor* (1914) 23 I. C 661 (P C) at p 674

guished from the members of the public The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute-law his privilege is no other and no higher The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of conscientious journalist do, make him more careful , but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject No privilege attaches to his position".

Speaking to the Parliamentary delegation, the Secretary of the All-India Newspaper Editors' Conference[1] said that "under the Press laws not even one-tenth of what was actually written could be written What was written was being written because those who wrote were prepared to take the consequences" This, it has to be admitted, is a brief but accurate statement of the position as it obtains to-day The law controlling the Press is all-embracing, but it is not as widely enforced as it might be But this is mere forbearance on the part of the executive and all the while there remains the possibility of the law swooping down on the Press in all its ruthless severity Whatever liberty there is, exists by the grace of the executive and not because it flows from the rule of law of Dicey's conception

Easily the most important of the laws affecting the Press is the Indian Press (Emergency Powers) Act, 1931 It is substantially a re-enactment of the earlier Press Act of 1910 The circumstances and the method of its enactment are typical of the enactment of "special statutes" On the inauguration of the Reforms of 1919, the Act of 1910 was repealed on the recommendation of a Press Committee which considered "the retention of the law not only unnecessary but incompatible with the increasing association of the representatives of the people in the administration of the country". When the Civil Disobedience movement was started, the Governor-General enacted the Indian Press (Emergency Powers) Ordinance, 1930 Later on it was enacted by the Indian Legislature purely as a temporary measure for the maximum period of three years But on the expiry of this period, the Government wanted the deletion of sec 2 (3) (which limited the operation of the statute) so as to make it a permanent measure The Legislative Assembly,

1 Reported in the *Hindustan Times* of 7 1 46

having a substantial elected majority, threw out the Government Bill The Governor-General, in exercise of his powers under Section 67B of the then Constitution Act, enacted it as law, with the concurrrence of only the second chamber of the Legislature Thus the Act is law but it is almost purely executive-made law

Section 3 of the Act of 1931 empowers the Magistrate or the Provincial Government to require deposits to be made by printing presses and sec 4 provides for the forfeiture of the deposit and if there is no deposit for the forfeiture of the Press This section is founded on the similar provision in the Act of 1910, whose scope was considered by Abdur Rahim, C J Ag in *Annie Besant's Case*[1] His Lordship said "That generally speaking the terms of the section are extremely wide and comprehensive cannot be doubted They vest the Local Government with a discretion so large and unfettered that the keeping of printing presses and the publication of newspapers become an extremely hazardous undertaking in the country A Press may be devoted to the printing of most useful and meritorious literature or other publications of an entirely innocent and non controversial nature, yet it will be liable to forfeiture if any matters printed in such press are considered by the Government to be objectionable within the meaning of the Act It may be doubted if it is possible for the keeper of any printing press in the country to maintain such efficient expert supervision over matters that are printed as to detect everything that might be regarded to fall within the 'widespread net' of section 4 Similarly a newspaper may be consistently staunch in its loyalty to Government, its general policy may be well above reproach, the sincerity and bona fides of the intention of the editor may not be liable to question, but if any letters or other writings are let in, may be through carelessness, which comes within the scope of any of the clauses to section 4, the Government may at once without any trial or even a warning forfeit the security, and in this way ultimately put an end to the newspaper itself That the influence of a periodical on the public life of the country is on the whole decidedly beneficial need be no bar to Government's action The Local Government, it may be assumed, will not indiscriminately exercise the power which it possesses under the enactment, but the vesting of such unlimited power in the Executive Government is undoubtedly a serious

1 *Annie Besant vs Govt. of Madras* (1917) 37 I C 525 at pp 579-80

encroachment on the freedom which the Press in India enjoyed before the passing of the Act"

A printer or a publisher who is affected by an order of forfeiture may apply to the High Court, under sec 23 of the Act, to set aside the order but the High Court's jurisdiction is limited only to examine whether or not the alleged offending passage or passages come within the scope of the sec 4 (1) The High Court is constituted a Special Tribunal under a special enactment for a single specific purpose[1] and has no power to apportion punishment or reduce the penalty if even a single sentence is obnoxious to section 4 (1)[2] The widespread net of the section has been held in recent cases, to cover (i) advocacy of social boycott of persons participating in elections[3] (ii) criticising administration of justice by Special Courts[4] (iii) imputing motive to Government of protecting foreign industries[5] (iv) denunciation of British rule as foreign domination[6] (v) referring to Government in terms such as "uplifted hand of oppression," "oppressed and humiliated India," "India persecuted and under subjection" "piteous wail of suffering people"[7] (vi) allegation that Government had deliberately created famine conditions in order to force people into recruitment[8] (vii) adulation of a revolutionary hero like Mr V D Savarkar[9] and (viii) attacks on the police as such[10] But criticism of a few police officers stationed at a particular place is not covered by the section[11] nor is the advocacy of "revolution"[12] if there is no indication that it is to be a violent one, nor yet the statement that fight should be continued till freedom is attained[13] The

1 Per Abdur Rahim C J Ag in 37 I C 525 at p 589

2 Per Shadilal C J in *Prithvi Duss vs Emperor* A I R 1931 Lah 283 at p 288

3 Ibid

4 *In re Pothan Joseph* A I R 1932 Bom 468

5 *In re Ananda Bazar Patrika* A I R 1932 745

6 *In re Amrita Bazar Patrika* A I R 1932 Cal 738

7 *In re Anukul Chandra* A I R 1933 Cal 278

8 *Nagpur Times vs Emperor* A I R 1944 Nag 178

9 *In re Krishnamurthy Ayyar* A I R 1942 Mad 690 See also *Bapuji Kunbi vs Central Provinces* A I R 1933 Nag 148

10 *In re Zamindar* A I R 1934 Lah. 219

11 *In re Janasakti* A I R 1933 Cal 649

12 *Des Raj vs Emperor* A I R 1934 Lah 264

13 *In re Advance* A I R 1933 Cal 754

courts have insisted on strict construction of the statute in the interests of the liberties of the subject and on reading the printed passage in a free, liberal and generous spirit

(C)—Statutory Immunities

There is freedom of speech for the proper functioning of the legislatures and the courts The Constitution Act[1] enacts that "There shall be freedom of speech in the Legislature, and no member of the Legislature shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any Committee thereof" This exemption is further extended to "the publication by or under the authority of either Chamber of the Legislature of any report, paper, notes or proceedings" So a newspaper publishing a report of a member's speech is not protected The common law privileges of the English Parliament do not inhere in a colonial legislature,[2] which however can pass an Act conferring those privileges on its members A few provincial legislatures in India have passed such Acts

It has been noted earlier that the Judicial Officers' Protection Act, 1850 gives to the judges in India the same protection as the judges in England have But whether counsel in India has got similar absolute immunity is not altogether free from doubt The ninth exception to sec 499 Indian Penal Code (defining defamation) is the statutory provision dealing with the matter It runs as follows "It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good" Not only counsel, but parties and witnesses fall within the ambit of this rule So far as the latter are concerned malice in making a defamatory statement before the court will take them out of the protection of the exception It has been held that "recourse cannot be had to the English common law (which gives absolute immunity) to add new grounds of exception to those contained in the Statute"[3] So far as counsel are

1 Constitution Act Secs 28 and 71

2 *Kielley vs Carson* 4 Moo P C C 63

3 *Tiruvengada Mudali vs Tripurasundari Ammal* (1926) 49 Mad 728 F B at p 737 See also *Bai Shanta vs Umrao Ali Amin* (1925) 50 Bom 162 and *Haider Ali vs Abru Mia* (1905) 32 Cal 756.

concerned, there are two Full Bench decisions of the Madras and Bombay High Courts[1] which lay down that they have got the same absolute immunity as counsel in England But other decisions give them qualified immunity though "a court, having due regard to public policy, should be extremely cautious before it deprived an Advocate of the protection of this Exception" [2]

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1 *Sullivan vs Norton* (1886) 10 Mad 28 F B *Bhashankar vs. L M Wadia* (1899) 2 Bom L R 3 F B

2 *Nagappa Trikunja* (1894) 19 Bom 340

CHAPTER X

Right of Free of Association

Freedom of association is yet another of universal human rights and is protected in all constitutions which provide for fundamental guarantees It is of importance not only in the relationship between the State and the citizen but also between the citizens inter se India is a land of many religions, and each one of the major religions has got a number of sects within its fold A great portion of Indian case law on the subject relates to the claims of rival sects or religious groups to carry processions or conduct festivals on the highways

(A)—Processions and Meetings

At one time there was some authority for the proposition that such claims were governed by the personal laws of the Hindus (and the Muslims) [1] A Hindu sect contended before the Sadar Adalat of Madras that under the Hindu law it had the right to prevent the rival sect from using the public streets for the worship of its saint and for processions in his honour The contention was successful The decision was relied on as barring, on the principle of resjudicata, a similar claim which came up before the Madras High Court [2] It was there held that there could be no resjudicata where the question was raised and decided not as a question of fact but as a question of law The correct law was declared to be "that persons of whatever sect are at liberty to erect buildings and therein conduct public worship on their own land, provided they neither invade the rights of property enjoyed by their neighbours, nor cause a public nuisance, and that they are also entitled to conduct religious processions through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrate may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace"

An exhaustive exposition of the law relating to processions was made in a case that came up a year later before the

1 Sudder Adalat 55 of 1853 referred to in (1882) 5 Mad 304 at p 306
2 *Parthasarathy vs Chinnakrishna* (1882) 5 Mad 304 at p. 309

Full Bench of the same Court[1] The opposing parties to the case were Hindus and Muhumadans, and the question before the Court was stoppage of Hindu religious music before the mosque of the Muhummadans Dealing with the question of customary privilege claimed by the Muslims that music should be stopped at all times on the ground of the sanctity of the building of the mosque, and not merely on the ground of disturbance to the congregation at the time of public worship, Turner C J observed in the course of his judgment 'With reference to the privileges claimed on the ground of caste or creed, I may observe that they had their origin in times when a State religion influenced the public and private law of the country, and are hardly compatible with the principles which regulate British administration, the equal rights of all citizens and the complete neutrality of the State in matters of religion The members of one caste, have not been allowed to restrict members of other castes from the free use of public thoroughfares[2] The pariah of Malabar is no longer excluded from courts of justice These are innovations but the supeseded usages are obviously condemned by the spirit of our laws When anarchy or absolutism yield place to well-ordered liberty, change there must be but change in direction which would command the assent of the intelligence of the country With regard to processions, if they are of a religious character, and the religious sentiment is to be considered, it is not less a hardship on the adherents of a creed (i e the Hindus) that they should be compelled to intermit their worship at a particular point, than it is on the adherents of another creed (i e the Muslims) that they should be compelled to allow the passage of such a procession past the temples they revere But the prejudices of particular sects ought not to influence the law A man may have just ground of complaint if he is compelled to recognise the sanctity claimed for a place as the seat of a worship he believes to be false, he has no just ground of complaint if he is compelled to recognise the civil right of the citizens to be protected from disturbance when they are assembled for public worship, unless indeed all recognition of public worship is repugnant to him Again, assuming that the courts were satisfied that a privilege had been duly acquired and that it was competent to them to recognise it, it must be

1 *Sundaram Chetti vs The Queen* (1883) 6 Mad 203 at pp 217-18.
2 See *Sundareshwar vs Emperor* (1926) 102 I C 481 which decided the question of use of highways by Panchamas notwithstanding custom to the contrary

remembered that it is based on custom and that custom is sound only when and in so far as it is reasonable It would have then to be considered, whether it was reasonable to require persons exercising a natural right to abstain from its exercise when passing a place where no public worship was proceeding" It was laid down that the law recognising the right to the undisturbed performance of public worship is not extended to private worship such as may take place in a mosque at all hours of the day

In deciding a case[1] between two rival sects of Muslims, the Shias and the Sunnis, the Privy Council approved of the principle of law as laid down by Chief Justice Turner. Their Lordships referred to an earlier decision[2] in which the Privy Council had affirmed the High Court's judgment based on the same principle and added that "no doubt was there thrown on the rights of religious worship on the highway" Religious worship includes both religious procession and religious festival[3]

The relief in cases of public ways and highways is given by the civil courts on the rule of justice, equity and good conscience[4] The Privy Council[5] has decided that that rule means application of the English principles unless there is something in the state of Indian society which makes those principles inapplicable altogether or necessarily modified Several High Courts, following English authorities, based on the distinction between indictment and civil action, held that no action could be maintained, for what was a mere general obstruction of a highway affecting the public at large, by one person without proof of special damage These decisions[6] were overruled by the Privy Council in *Manzur Hussain's case*[7] Their Lordships expressed the opinion that the distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied in India Uuder the law as it stands to-day the civil courts can give relief without any special damage being alleged or proved[8]

1 *Manzur Hasan vs Md Jaman* (1924) 86 I C 236 P C
2 *Sadagopalachariar vs Krishnamorthy* (1907) 30 Mad 185 (P C) affirming the decision of the Madras High Court in 26 Mad 376
3 *Pichandi Murugappa vs Kuppuswami* A I R 1938 Mad 819
4 *Md Raza vs Md Ashkari* (1924) 85 I C 304 (Alld)
5 *Waghela Rajsanji vs Sheikh Masluddin* (1886) 11 Bom 551
6 See 85 I C 304 and cases cited therein
7 86 I C 236 (P C)
8 See e g *Dasrath vs Narain* A I R 1941 Pat, 249,

In a civil suit for declaration of a general right of the community or sect, injunction on the rival community or sect cannot be granted to restrain it from interfering with the exercise of the right It is left to the executive to implement the declaration in the best way possible[1] The exercise of the right of religious worship on a highway, is, the Privy Council[2] has laid down, "subject to the order of the local authorities regulating the traffic and the Magistrate's directions and the rights of the public" These reservations were elucidated by Sulaiman J[3] in the following words "The effect of the first reservation is that the local authorities, whether magistrates or police, have power to issue directions for the regulation of traffic on public thoroughfares and preventing obstruction even though they may involve a restriction of the use of such thoroughfares The second reservation preserves the authority of the magistrates to issue orders under sec 144 Cr P Code, for the purpose of preventing obstruction annoyance or injury, danger to human life, health or safety or a disturbance of the public tranquility as well as orders under other statutory provisions The propriety of such orders cannot be questioned in a civil suit The third reservation ensures that the exercise of the right to take out religious processions should not infringe the rights of other members of the public"

The Full Bench of the Madras High Court[4] also considered the question of limitations that executive authorities may put on the exercise of the right to take out processions, specially with reference to what is now sec 144 Cr P Code Turner C J said "The Criminal Procedure Code declares the authority of the magistrate to suspend the exercise of rights recognised by law, when such rights may conflict with other rights of the public or tend to endanger the public peace But by numerous decisions it has been ruled that this authority is limited by the special ends it was designed to secure and is not destructive of the suspended rights It should always be borne in mind that orders under (now Sec 144) of the Criminal Procedure Code are not judicial proceedings and if the High Court has power to

1 See e g the very recent cases *Mohd Umar vs Jugal Kishore* A I R 1944 All 264 *Haider Hussain vs Syed Ali* A I R 1945 All 54.

2 86 I C 236 (P C)

3 *Md Jalil Khan vs Ramnath* A.I R 1931 All 341 at p 346.

4 (1883) 6 Mad 203 (F B)

correct them otherwise than indirectly,[1] which is doubtful, that power can rarely be exercised in time to prevent hardship The law in sanctioning this imperfectly controlled power is careful to provide that it shall be committed only to Magistrates whose discretion is presumably guaranteed by their responsible position or by selection"

In this case there was a petition by the Hindus to the District Magistrate for adequate protection The Magistrate's order was that he had not the means at his disposal and further that "even if he had it, it was by no means clear to him it would be his duty to give it" The Chief Justice remarked that the order was not judiciously worded and referred to the opinion of the Sessions Judge that "religious fanaticism had little to do with the outbreak (of the riots) It was rather a feeling that law was not strong enough to protect the Hindus in the exercise of their civil right, or in other words, a feeling that the authorities stood in awe of the Muhummadans"

In this case the District Magistrate had issued expaite, on the petition of the Muhummadans, an order under (now sec 144 of) the Criminal Procedure Code prohibiting the Hindus from passing the mosque with music for a fortnight during which their festival was to take place Referring to this order the Chief Justice observed "The prohibitory order was dictated by the Magistrate's apprehension, that disturbance would attend the exercise of the right, but from whom was disturbance to be apprehended except from the party that opposed the exercise of the right? Such an order issued under such circumstances involves an admission that lawlessness is anticipated and that at the time the executive is not in a position to afford adequate protection When such orders are repeated, their justification, the preservation of the public peace, is not so obvious to those whose rights they interfere with, as are their results The impression is created that the authorities are powerless against the class from whom violence is apprehended; and that a show of force will be more effectual to secure the recognition of civil rights than an appeal to the constituted tribunals" His Lordship mentioned to how in this particular case a judicial declaration as to religious rights had been rendered nugatory

1 The restrictions placed on the High Court's power of revision were removed by the Amending Act of 1923 See *Sumner vs Jogendra* A.I.R 1933 Cal 348 in which an order under Sec 144 Cr P Code was set aside as having been passed on insufficient material

by the executive professing to act under the provisions of law

Very nearly half-a-century later the same High Court had to issue a similar warning in a similar case There also there had been a judicial declaration of right and even so the authorities had prevented its exercise by resorting to sec 144 of the Criminal Procedure Code Phillips J[1] said "The Sub-Divisional Magistrate while recognising no doubt the rights of the Hindus to take the procession, held, that the likelihood of rioting and bloodshed was too great to allow them to exercise their lawful rights This seems to me to be a confession of impotence on the part of the authorities The District Magistrate is undoubtedly the person who is to look after the peace of his District and naturally in cases of sudden emergency it may be necessary to restrict a person from exercising a perfectly lawful right But it should not be necessary to prevent that person from not only on a particular occasion in the near future but for all time from exercising that right because it would be too much trouble to render him adequate protection against persons who intend to disobey the law Any interruption of the procession by the Muhummadans, so long as it is conducted in accordance with the decree of the Civil Court, is undoubtedly an infraction of the law and for the Government to state that they are not prepared to prevent the infraction of the law and to restrain law-breakers from interfering with lawful rights is practically to abdicate all authority Orders under sec 144 Cr P Code are certainly not intended to be used as a means of depriving the citizens of lawful rights which have been declared by competent courts"

In the same district relating to the same matter there was again an order under section 144 Cr P Code after two years The petition for revising the order was placed before a Full Bench[2] of Five Judges at the instance of the Public Prosecutor The Court observed "Where there is a conflict between public interest and private right, the former must prevail The right which the petitioners claim and are entitled, in ordinary circumstances, to exercise, has once been enforced by drafting Police into the town from seven other districts If the Government consider that this is the only method by which the right can effectively be enforced, but that it cannot be adopted without danger to the public

1 *Subbayya vs Falauddin* (1926) 101 I C 893
2 *In re Viswanandha Rao* (1928) 112 I C 863

interest at large, it is not for us to say that they are bound to adopt it or to suggest other means of enforcement, as to the efficiency or advisability of which they, and not we, are the proper judges" This gives to the Executive much wider power than it had under the previous decisions

The Police Act, 1861, by section 30, authorises a police officer of high rank "to direct the conduct of all assemblies and processions on the public roads, or in the public streets or thoroughfares, and prescribe the routes by which, and the times at which, such processions may pass" He may also, on being satisfied that it is "intended by any persons or class of persons to convene or collect an assembly in any such road, street or throughfare, or to form a procession which would, in the judgment of the Magistrate of the District or of the sub-division of a District, if uncontrolled, be likely to cause a breach of the peace, require by general or special notice that the persons convening or collecting such assembly or directing or promoting such procession, shall apply for a license"

Where there is disobedience of directions given by the police officer or the Magistrate, as the case may be, the assembly becomes on unlawful assembly and its members are liable to be punished by the criminal courts Under sec 141 of the Penal Code, an assembly of five or more persons is designated an unlawful assembly, if the persons composing that assembly have any one of the five common objects mentioned in the section, one of them being to "resist the execution of any law or of any legal process"

Dealing with the contention that the notification issued under the Police Act was not law or legal process Mullick J[1] (Coutts J concurring and Das J dissenting) said . "The reply is that when a notification is issued by an executive authority in exercise of the power conferred by statute, that notification is as much a part of the law as if it had been incorporated within the body of the statute at the time of the enactment The command is in every respect a command of the appropriate legislative authority Where the notification is in compliance with the statute, it is a law and certainly a legal process" It was further held that the refusal of the assembly to disperse at the command of the police was an over act that constituted resistance

1 *Emperor vs Abdul Hamid* (1922) 68 I C 945 at p 947 See also *Public Prosecutor vs Satya Narayana* A I R 1931 Mad 284

(B)—Dispersal of unlawful assembly

An unlawful assembly can be dispersed by force Secs 128 to 131 of the Criminal Procedure Code control the use of such force Any male person, not being a member of the military forces, may be required to assist in such dispersal The Magistrate of the highest rank who is present may requisition military help when necessary If there is no Magistrate present any commissioned officer of the Army can disperse it by force The cardinal principle is statutorily laid down that in dispersing an assembly as little force is to be used and as little injury to person and property is to be done as may be consistent with dispersing the assembly and arresting and detaining its members The principle was elaborated in the despatch[1] of the Secretary of State for India to the Governor-General relating to the firing under the orders of General Dyer at Jallianwala Bagh in Amritsar city on the afternoon of April the 13th 1919 The despatch runs "The principle which has consistently governed the policy of His Majesty's Government in directing the methods to be employed, when military action in support of the civil authority is required, may be broadly stated as using the minimum force necessary His Majesty's Government are determined that this principle shall remain the primary factor of policy whenever circumstances unfortunately necessitate the suppression of civil disorder by military force within the British Empire

"It must regretfully but without possibility of doubt be concluded that Brigadier-General Dyer's action at Jallianwalla Bagh was in complete violation of this principle The task which confronted him was to disperse by force if necessary a large but apparently unarmed assembly which had gathered in defiance of his orders It is possible that considering the strength of the military force at his disposal, the size of the crowd, and the general temper and attitude of the inhabitants of the city, he would have found it impossible to achieve this task effectively and completely without some firing and without causing some loss of life But it is certain that he made no attempt to ascertain the minimum amount of force which he was compelled to employ, that the force which he actually employed was greatly in excess of that required to achieve the dispersal of the crowd, and that it resulted in lamentable and unnecessary loss of life and suffering But this is not a full statement of Brigadier-

1 Disorders Enquiry Committee Report pp xlv-xlvi

General Dyer's error There can be no doubt that large numbers of people in the assembly, many of whom were visitors to the city from surrounding villages, were ignorant of the existence of his proclamation and the danger which they ran by attending the gathering The proclamation was published in only a portion of the city, that portion being some distance from the scene of the meeting, and no warning of any kind was given before fire was opened It would be unfair, considering the state of the city, the heat of the weather and the strain to which the troops under General Dyer's command had been subjected since their arrival in the city, to lay too great stress upon the first point, but the ommission to give warning before fire was opened is inexcusable Further, that Brigadier-General Dyer should have taken no steps to see that some attempt was made to give medical assistance to the dying and the wounded was an ommission from his obvious duty But the gravest feature of the case against Brigadier-General Dyer is his avowed conception of his duty in the circumstances which confronted him

"His Majesty's Government repudiate emphatically the doctrine upon which Brigadier-General Dyer based his action which to judge from his own statement might have taken an even more drastic form had he had a large force at his disposal and had a physical accident not prevented him from using his armoured cars They have not overlooked the extreme gravity of the situation as it presented itself to the authorities in India generally and to Brigadier-General Dyer in particular on April the 13th, nor have they failed to appreciate the immensity of the responsibility which Brigadier-General Dyer felt and rightly felt to be imposed upon him by that situation They think it is possible that the danger to the lives of Europeans and to the safety of the British and Indian troops was greater than appears from the Committee's report In Amritsar itself violent murder and arson of the most savage description had occurred three days previously and the city was still practically in possession of the mob From the surrounding country-side reports were hourly being received of similar violent outbreaks and attacks upon communications, and the deficiencies in these reports (due to the success of the attacks on communications) were supplemented by rumours which there was little means of verifying and as little ground for disbelieving In discharging this responsibility with the small force at his disposal Brigadier-General Dyer naturally could not dismiss from

his mind the conditions in the Punjab generally and he was entitled to lay his plans with reference to those conditions But he was not entitled to select for condign punishment an unarmed crowd which, when he inflicted that punishment, had committed no act of violence, had made no attempt to oppose him by force, and many members of which must have been unaware that they were disobeying his commands"

It remains to consider the case where the assembly is lawful and peaceful but the breach of public tranquility is threatened by others who propose to take the law in their own hands to oppose the assembly Section 127 of the Criminal Procedure Code gives power to the executive not only to disperse an "unlawful assembly within the meaning of the term in the Penal Code", but also "an assembly of five or more persons likely to cause a disturbance of the public peace" It was held in an early Bombay case,[1] in which the Salvation Army figured, that where the assembly is in itself lawful but is likely to excite such opposition as may cause breach of public peace it was liable to be dispersed under (now) sec 127 of the Criminal Procedure Code. and that its members were liable to punishment under sec 151 of the Penal Code for continuing to be members, after a lawful command to disperse had been given

What is a "lawful" command? Has the court power to examine whether the command was justified or not? The courts have given due weight to the opinion of the executive officers dealing with the situation but have refused to accept it as final and binding on them and asserted the right to examine the surrounding circumstances They will not allow public authorities to exercise their statutory powers arbitrarily or tyrannically[2] In a Nagpur case[3] Niyogi J held that the order of dispersal was unjustified, and that its disobedience was not an offence under the law

It should be emphasised that the order of dispersal can only be given by the executive authorities None else has a right to obstruct a lawful assembly Where the accused so obstructed a procession on the ground that it was a nuisance and an annoyance, the Madras High Court[4] held that the

1 *Tucker vs Emperor* (1882) 7 Bom 42 See also *Emperor vs Raghunath* (1924) 85 I C 823
2 *Nagar Valab vs Dhanchuka Municipality* (1887) 12 Bom 490 cited in *Bhalchandra vs Emperor* A I R 1929 Bom 433 at p 435
3 *In re Jaswant* A I R 1933 Nag 277
4 (1869) 5 M H C R App x pp vi-vii

accused themselves constituted an unlawful assembly with the common object "to deprive the persons in the lawful assembly of the enjoyment of a right of way" within the meaning of sec 141 (4) I P C

(C)—Trade Unions

The law in India as to trade unions, "the most commonly active form of combination in modern life,"[1] is laid down in the Trade Unions Act, 1926 and the Trade Disputes Act, 1929 A trade union can get itself registered under the Act of 1926, and thus become a body corporate As such it can own general funds and spend them on objects enumerated in sec 15 of the Act Officers and members of the union are protected from the operation of the criminal law as to conspiracy "in respect of any agreement made between the members for the purpose of furthering any of its objects (as specified in sec 15) unless the agreement is an agreement to commit an offence" The union is protected against liability in civil proceedings in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the trade union is a party on the ground only that such act induces some other person to break a contract of employment or that it is in interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills" The principle of *respondeat superior* does not apply to a union with respect to the actions of a member done "without the knowledge or contrary to the express instructions given by the executive of the union"

The Act of 1929 contains provisions about conditions which must be fulfilled before resort can be had to strike in a public utility service as defined in the Act It declares a strike or a lock-out illegal which has an ulterior object and "is designed or calculated to inflict severe, general and prolonged hardship upon the community and thereby compel the Government to take or abstain from taking any particular course of action" The explanation is added that the second condition is effective only when compulsion of the Government is reasonably expected as a consequence of the strike It was contended by the Crown before the Bombay High Court[2] that the strike of the textile industry throughout the

1 Harrison Law of Conspiracy p 61
2 *Emperor vs Alwe* A I R 1936 Bom 5

whole of India was an illegal strike within the meaning of the Act The contention failed as there was no evidence before the court to justify it in holding that "a strike in textile trade, however prolonged, would necessarily or probably cause severe, general and prolonged hardship to the community as opposed to those engaged in the textile trade"

The judgment is remarkable as it proceeded entirely on the construction of the Indian Act and no reference was made to either English law or English cases The particular provisions which were before the court were based on the Trade Disputes and Trade Unions Act of 1927[1] enacted in consequence of the general strike of 1926. Indeed the entire law in India relating to trade combinations is based on the corresponding English law and cannot be correctly grasped without constant reference to it For instance the provision about protection of Trade Union members from charges of criminal conspiracy was made not because it was called for by Indian decisions, but because such protection statutorily had to be given in England against the common law doctrine about trade combinations developed by a long chain of judicial decisions The very language of the section giving protection against civil suits for damages, is taken from Sir W Erle's memorandum appended to the report of the Royal Commission on Trade Unions of 1867

(D)—Special Statutes

Of the special statutes supplementing the ordinary law relating to freedom of association, the Criminal Law Amendment Act 1908 is easily the most important It empowers the Local Government by notification in the official Gazette to declare an association unlawful on the grounds mentioned in section 16 which are in effect this that the association constitutes a danger to the public peace Under Sec. 17 (1) it is provided that whoever is a member of an unlawful association or takes part in meetings of any such association or contributes or receives or solicits any contribution for the purpose of any suchassociation or in any way assists the operations of any such association is liable to punishment So also is any body who manages or assists in managing, promotes or assists in promoting, a meeting of any such association or any members thereof as such members The language is very wide.

1 A Bill to repeal certain provisions of this Act is now before the House of Commons.

Is a person arrested just a few days after the notification liable under section 17? In a Bombay case[1] the prosecution argued that the accused should be presumed to remain members of the unlawful association on the day of their arrest, or in the alternative the accused should prove affirmatively that they were not members The Court repelled both the arguments, which were really one argument in two forms Beaumont C J said 'It seems to me that there can be no justification whatever for presuming that because a person was a member of an association which was lawful, he remained a member of that association after it had been declared unlawful To make such a presumption would in my view be to ignore both the presumption of innocence, which is always made in a criminal case, and the presumption which is made in all cases, whether civil or criminal, that people behave rightly and properly There is no necessity for the members of an association declared unlawful to take any active step to bring their connection with the association to an end"

In another case,[2] coming up at the same time, his Lordship said "There must, I think, be some limitation upon the generality of the words (in section 17) I think that the true limitation is really this, that there must be such a connexion between the acts of the accused and the operations of the unlawful association that an intention to assist the operations of such an association may be properly inferred" In another case[3] it was held that publication in a newspaper of harmless criticism from an organ (assuming it to be) of the association declared unlawful, was not assisting its operations within the meaning of section 17 of the Act Similarly it was held that hoisting of the Congress flag[4] or advocating boycott[5] did not come within the mischief of the section

The notification declaring an association unlawful need not name the association or particularise it The Calcutta High Court[6] held a notification valid which declared "all associations unlawful by whatever name the associations might be known or whether they might be known by any distinctive name or not", having certain enumerated objects

1 *Sripad vs Emperor* A I R 1931 Bom 129
2 *Gangu Bai vs Emperor* A I R 1931 Bom 203
3 *Sadanand vs Emperor* A I R 1931 Bom 413
4 *Jagendramohan vs Emperor* A I R 1933 Cal 695(2) also *Ram Prasad vs Emperor* A I R 1933 All 95
5 *Iswarudu vs Emperor* A I R 1933 Mad 369
6 *Swadeshranjan vs Emperor* A I R 1934 Cal 161

The Prevention of Seditious Meetings Act, 1911, empowers the Provincial Government to declare the whole or any part of a Province a "proclaimed area" On such declaration the District Magistrate is invested with the power to "prohibit any public meeting, if in his opinion such public meeting is likely to promote sedition or disaffection or to cause a disturbance of the public tranquility" The Act requires written notice for "a meeting for the furtherance or discussion of any subject likely to cause disturbance or public excitement" and where, such notice is not given, the persons concerned in the promotion or conduct of the meeting are liable to punishment The wording of the Act is wide and the executive is invested with almost limitless powers to control the citizen's right of free association and discussion

CHAPTER XI

The Right of Property

In Common Law sanctity of property yields in importance only to sanctity of personal liberty, It was round its preservation from the onslaughts of the Prerogative that the biggest battles for constitutional liberty were waged in England The victory of Parliament is enshrined in the Bill of Rights which provides that "the levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time and in other manner than the same is or shall be granted is illegal" The courts are jealous that no burden should be placed on the subject's property except under direct parliamentary authority[1] And when a parliamentary statute does lay such a burden the judges favour the construction that is of benefit to the subject When a socialistic piece of legislation loses by such construction, the judges are criticised by the advanced section of constitutional writers and are defended by the other section holding orthodox views

The Constitution Act of India, by sec 299, guarantees the enjoyment of property of which no person can be deprived save by authority of law This does but give statutory recognition to the general principle of British jurisprudence,[2] which has always been in operation in India The Privy Council[3] said in 1870 "The principle is not merely of English law, not a principle peculiar to any system of municipal law but it is a principle founded on universal law and justice, that it is to say whoever has the land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property remains in the original owner The site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site is ascertained" The question before their Lordships was who was the owner of the land that had been washed away by the course of the

1 See e g *Ferrier vs Scottish Milk Marketing Board* 1937 A C 126
2 *Tan Bug Tain vs Collector of Bombay* 1945 F L, J 247 at p 277
3 *Lopez vs Muddun Mohun Thakoor* (1870) 13 M I, A 467

river and afterwards reformed on the old ascertained site They referred to an earlier decision of the Board[1] in which it was said "The land in dispute was inundated about the year 1797, it remained covered with water till about 1801, it then became partially dry till in the year 1814, it was again inundated After this period, it once again appeared above the surface of the water, and by the year 1820 had become very valuable land The question, then, is, to whom did this land belong before the inundation Whoever was the owner then, remained the owner while it was covered with water, and after it became dry" Dealing with the provision about accretion in the Regulation[2] under consideration it was decided that it related only to state property "What the legislature was dealing with was the gain which an individual proprietor might make in this way (i e by accretion) from that which was part of public property, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the state, a public river belonging to the state, this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which, by accretion, became valuable and usable out of that which was in a state of nature neither valuable nor usable" Two years later in a case[3] with similar facts the Privy Council rejected the argument that "by diluviation into a navigable river land is permanently lost to the original proprietor and becomes the property of the state" The above decisions have been reviewed and followed in a recent case[4] before the Board

The Constitution Act, by sec 290 (2), enacts that "neither the Federal (i e Central) nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation, for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined" This is but enshrining as a fundamental guarantee the principle of the legislation regarding acquisition of land The Land Acquisition Act, 1894, provides meticulously for payment of compensation,

1 *Mst Imam Bandi vs Hurgovind Ghose* (1849) 4 M I A 403 at p 406
2 Regulation XI of 1825,
3 *Nogendra Chandra Ghose vs Mahomed Esoff* (1872) 18 W R 113 (P C) at p 119
4 *Keshava Prasad Singh vs Secretary of State* (1927) 101 I C 1 (P C)

and lays down the basis of the calculation of compensation for land compulsorily acquired These provisions are "practically just what have been laid down as the law in England "[1] The principle of calculation is that "an owner of lands is entitled to the value to himself of the property in its actual condition at the time of its expropriation with all its then existing advantages and with all its future possibilities, excluding any advantage due to the carrying out of the scheme for the purposes for which the property was being acquired "[2]

In India there is not, or there has not been till very lately, any representative Parliament to authorise the raising of revenue The rule of 'no taxation without representation' or 'grievances before supply' has no application to this country But taxation can be levied on the people only under the authority of the law Such law is mostly statutory law But land revenue is collected on the authority of what is sometimes called the common law of India[3] and is referred to in the Constitution Act (Sec 226) as 'the usage and practice of the country" The Prerogative obtains in India, in the words of Bhasyam Ayyangar J[4], "of imposing by executive act assessment on lands and varying the same from time to time" This prerogative is not lost by non-user So where land, which had never been assessed before, was assessed to revenue in 1926 and it was contended that a lost grant containing an exemption from land revenue should be presumed, the Privy Council[5] observed "The law may presume the existence of a grant which has been lost where it is sought to disturb a person in the enjoyment of a right which he and his predecessors have immemorially enjoyed, but it is a different thing to seek to presume that the Crown has by some last grant deprived itself of the prerogative power to tax the property of its subject and their Lordships are of opinion that the plea is untenable"

None but the Crown has got the Prerogative to tax, and since Prerogative is a matter of law it is judicially determinable A Full Bench of the Madras High Court[6] had before it the question whether a tax on the weavers, called

1 *Vallabhdas Narainji vs The Collector* A I R 1929 P C 112 (113)
2 *Atmaram Bhagwant vs The Collector* A. I R 1929 P C 92 (94)
3 See e g *Vedanta vs Kanniyappa* (1885) 9 Mad 14
4 *Bell vs Madras Commissioners* (1902) 25 Mad 457 at p 482
5 *Goswami of Kutch Mandvi vs Collector of Bombay* A I R 1937 P C 271 (274)
6 *Vedanta vs Kanniyappa* (1885) 9 Mad. 14 (F B) at pp. 19-20.

muhtarafa, could be collected by the land owners under the common law of India In negativing the plea, their Lordships said "The right of the Sovereign power to collect taxes on trades is of extreme antiquity in India In the code ascribed to Manu an enumeration of the King's duties is followed by enumeration of the revenues he is entitled to collect Among these we find taxes on goods, on income and on labour There can be little doubt that these taxes were collected under Hindu Sovereigns, though not perhaps continuously or universally, the Muhummadans availed of the system of revenue they found established, and their collectors or farmers exacted dues which had long been customary, or revived dues which, though, obsolete, were not unwarranted by Hindu law It will be seen, however, that these dues were not exigible by the owners of land as such, but by the sovereign There can be no question that the Government never intended to treat the Zamindars with whom it effected a permanentsettlement of the land revenue as landed proprietors andto ignore any rights which conflicted with its own sovereignty"

The Constitution Act, by section 226 (1), prohibits a High Court to exercise its original jurisdiction "in any matter concerning the revenue, or concerning any act ordered or done in collection thereof" The Federal Court[1] has observed "This section corresponds to a provision enacted more than 150 years ago in very different circumstances, and it is anomalous to deny to the High Court in its original jurisdiction power to try questions which a subordinate court and the High Court itself in its appellate jurisdiction are not precluded from trying" The question is now under appeal in the Privy Council from the decision of the Federal Court

A taxing statute must be strictly construed With reference to a statement by a Commissioner of Income Tax that 'in substance the loans represented money lent by Bank A to Bank B,' the Privy Council[2] said "Their Lordships

1 *Governor-General in Council vs Raleigh Investment Co, Ltd* 1944 F C R 229 (244) In an early decision, *Collector Sea Customs vs Chithambaram* (1876) 1 Mad 89 (F B) the question was exhaustively considered Kernan J on a review of the Legislation in the matter, came to the conclusion that land revenue was the only revenue that was exempted from the the jurisdiction of the Supreme Court (p 131 of the report) and not other revenues

2 *Bank of Chettinad vs I T Commissioner* A I R 1940 P.C 183 at p 185

think it necessary once more to protest against the suggestion that in revenue cases 'the substance of the matter' may be regarded as distinguished from the strict legal position", and cited the following passage from the opinion of Lord Russel of Killowen[1] "I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute The subject is not taxable by inference or by analogy, but by the plain words of a statute applicable to the facts and circumstances of his case, As Lord Cairns[2] said many years ago As I understand the principle of all fiscal legislation it is this—If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be On the other if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be !"

So where a licence fee is sought to be imposed by a Municipal Corporation the court will see "whether it might reasonably cover the cost of all special services necessitated by the duties and liabilities imposed upon the Corporation in respect of the supervision and regulation"[3] of the object of licence Where the fee is disproportionate to the services rendered or is imposed pursuant to some policy of unfair discrimination, it will be declared ultra vires and the subject relieved of the burden[4] Similarly where a professional tax was levied on a supposed money-lender, and it was proved that he did not carry on the business of money-lending, the action of the taxing authority was declared ultra vires[5]

There can be no violation of the subject's property except under powers given by law So it is not lawful to enter a private house without the sanction of the owner, unless the statute expressly gives such authority[6] Section 96

1 *Inland Revenue Commissioners vs Duke of Westminster* (1936) A C 1 at p 24
2 *Partington vs Attorney-General* (1869)4 H L 100 at p 122
3 *Pazundaung Bazaar vs Municipal Corporation* A I R 1932 P C 217 at p. 220
4 *Municipality of Kumbakonam vs Ralli Bros* A I R 1931 Mad 497
5 *Balasuryaprased Rao vs Taluka Board Chicacole* A I R 1931 Mad. 822
6 *Feroza Peshkar vs. Emperor* (1912) 16 I C 499 at p 500.

of the Criminal Procedure Code empowers a court to issue a warrant for "general search or inspection" under circumstances mentioned in the section and section 105 of the Code empowers a Magistrate to direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant These two sections were much in debate in a case in which a District Magistrate was sued for trespass into the premises of the plaintiff for the alleged search for fire-arms supposed to have been used in an affray in the village The suit was brought up from the court in the mofussil and tried in the extraordinary original jurisdiction of the Calcutta High Court by Mr Justice Fletcher The appeal from his judgment awarding damages against the defendant was heard by the appellate Bench of the High Court[1] and rejected On further appeal to the Privy Council,[2] by special leave, the appeal was allowed and the plaintiff was non-suited The Privy Council found that the Magistrate had acted within the limits of his statutory authority It was further held that a Magistrate directing a search under section 105 of the Code acts in his judicial capacity and not in his executive capacity and is protected by the Judicial Officers' Protection Act, 1850 But their Lordships expressed their opinion that where a statute prescribes a preliminary condition, as recording of the grounds of belief under section 25 of the Arms Act of 1878, a Magistrate has no power to make a search without having complied with that preliminary condition

Although the Constitution Act invests the legislatures with wide powers of legislation with respect to property, yet it inhibits what is called "discriminatory legislation"[3] It is widely felt that these inhibitions are really meant to protect foreign vested interests in the country and a resolution has recently been passed in the Central Legislative Assembly asking for their repeal

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1 *Clarke vs Brojendra Kishore Roy* (1909) 2 I C 436
2 *Clarke vs Brojendra Kishore Roy* (1912) 16 I C 501 (P C)
3 See Chapter III of Part V (Sections 111-121)

CHAPTER XII

Allegiance

The Webbs[1] point out that the Russian Constitution 1936, for the first time in history, lays emphasis on the Duties of Man as supplemental to the Rights of Man These duties are basic duties to the community in which he lives and has his being Other constitutions in capitalistic countries confine the fundamental guarantees to the Rights alone But in *Laws of England*[2] one chapter is devoted to "the subject's duty towards the Crown" This deals only with one duty and that is Allegiance 'Allegiance is due to the King for the time being, both in his natural and in his legal or political capacity' The King is protected by the law of treason, which is founded on the Statute passed in 1352 The Statute mentions seven distinct offences, all of personal character "The King—not the Crown in Parliament, or the State as embodied in the existing constitution—is the object which the Statute designs to protect The King's person, the King's sovereignty, the King's family relations the *indicia* of the Royal will in administration, the seals, the representatives of the Royal will in judicature, the Chancellor and judges, the privileges of royalty, the coinage"[3] This statute has been extended by judicial construction and supplemented by the statutes of 1817 and 1848 Due largely to the difficulties experienced during the trial of Sir Roger Casement in 1917 the Treachery Act, 1940 was enacted after the outbreak of World War II It is an emergency statute of temporary duration

(A)—The Indian Law of Treason

The Indian statute law knew no such offence as treason till the enactment of the Penal Code in 1860.[4] Norman[5], offg C J thus described the situation "In taking upon itself the administration of criminal justice in Bengal, Bihar and Orissa,

1 "Soviet Communism"-Sidney & Beatrice Webb 3rd Edition p 437
2 2nd edition Vol VI p 414 ff
3 Anson "Law and Custom of the Constitution" ed Keith Vol II part I p 293
4 With the exception of the original jurisdictions of the Supreme Courts where the English law of treason obtained
5 *The Queen vs Ameeroddeen* (1871) 15 W R Cr 25 at p 27

the English Government, so far from abrogating the existing law of the land, and introducing English criminal law, undertook to administer the law as it stood, that is, the Mahomedan criminal law subject to such modifications as might be found necessary Accordingly, we find that crimes committed by natives of India against the State—as by levying war against the Crown and the like—outside the town of Calcutta, were formerly punished not as treason under English law, but as offences against the law of the land, i e Mahomedan law, after taking the futwas of the Mahomedan law officers See the case of Meerza Beg, declared liable to *tazeer* at the discretion of the ruler of the country, and sentenced to death in 1799—Harrington's Analysis Vol I pp 336-340, note Regulation IV of 1799"

The reluctance to enact the law of treason was due not so much to the zeal in preserving the Mahomedan criminal law as to the uncertainty about the person who was entitled to the allegiance of the Indian subject before the direct assumption of sovereignty by the Crown in 1858 There were double sovereignties, the dejure sovereignty of the Great Moghul and the defacto sovereignty of the British Crown exercised through the East India Company The Parliamentary statutes during this period spoke of the "British subjects" and "natives of India" as distinct entities, on the assumption that the natives of India were not British subjects[1] The Law Commissioners, entrusted with the task of recommending drafts of statutes to be passed by the Indian Legislature, recognised that "though it would be absurd to deny that the natives of British India are now subjects of His Majesty, it would be impossible to point out the particular time when they became so"

When the Indian law of treason was enacted in the Penal Code it related only to the Crown in its political capacity and not to the King in his natural capacity, as it was then felt unlikely that the English King would ever be present in person on the Indian soil The English law of treason was substantially enacted in Secs 121, 122 123 and 124 of the Code[2] Waging War against the Queen, or attempt to wage such war or abetting the waging of such war, collec-

1 See remarks in *Maharaja of Faridkot vs Anantram* (1928) 114 I C 62 at p 69

2 In *Aung Hla vs Emperor* A I R 1931 Rangoon 235 after an exhaustive review of English cases relating to treason the Special Bench came to the conclusion that the judicial construction of the Statute of Edward III was 'the undoubted law of the land" in Burma (p 238).

ting men, arms or ammunition or otherwise preparing to wage war with the intention of either waging war or being prepared to wage war, concealing by act or illegal ommission the existence of a design to wage war against the Queen intending by such concealment to facilitate or knowing it likely that such concealment will facilitate, the waging of such war, assaults, wrongful restraints or overawing by a show of criminal force, or attempts therefor, of the members of Government—these were the offences provided for In 1870, Sec 121A was added, which provided for treasonable conspiracies A departure from English law was made in the explanation to the section which laid down that no overt act was necessary to complete the offence

The language of the sections is wide and capable of misuse A safeguard was sought to be provided by section 196 of the Criminal Procedure Code, which required that the Court could take cognisance of a treasonable offence only upon a complaint made with the previous sanction of a Provincial Government The sanction and complaint form the basis of the Court's jurisdiction In the leading case[1] on the point Jenkins C J said " the policy of the safeguard is manifest, the maintenance of this control is of the highest importance, and it is beyond the competence of the Local Government to delegate to any other body this controlling power and the discretion it implies The question whether action should be taken is more than a matter of law, considerations of policy arise, and these can only be determined by the authorities specially designated in the section It further appears to me to be the true implication of section 196 that the judgment of the Local Government should be specifically directed to the particular section (or sections) in respect of which proceedings are to be taken, and that the order or authority should be preceded by, and be the result of, a deliberate determination that proceedings should be taken in respect of a particular section or particular sections and no other " In a case coming up before him a year later,[2] his Lordship observed "Section 196 of the Criminal Procedure Code confers no jurisdiction upon a Court to try a person in cases falling within its purview except upon a complaint made with the previous sanction of the Local Government .and a defect in the procedure laid down by section 196 cannot be remedied at all"

1 *Barindra Kumar Ghosh vs Emperor* (1909) 7 I.C 359 at p 365
2 *Emperor vs Lalit Mohan* (1910) 8 I C 1059.

But the safeguard of section 196 has not been effective in preventing "contemptible" cases[1] being brought before courts under the grandiloquent charge of "conspiracy to deprive the King of his sovereignty over India" Delivering the judgment of the Court in *Emperor versus Nonigopal*[2] Jenkins C J said "The proceedings in this case have been initiated by complaint made by order of the Local Government, with the policy of that order this Court has no concern I have hesitated much whether it could, with any show of reason, be said that the evidence has disclosed a conspiracy for so serious an end as waging war against His Majesty, and I have hesitated the more when I have borne in mind the class of men arraigned before us as accused, and the arms that have been disclosed, consisting as they do, for the most part, of a few revolvers, some muzzleloading guns, some antiquated and broken pistols and a handful of arrow-heads Still the provisions of the law are comprehensive and it does not require very formidable elements either in men or means to satisfy its definition of a conspiracy to wage war The determination of the Court that a conspiracy to wage war has been established does not imply, as its terms might suggest, the existence of a serious menace to the constitution or the stability of constituted authority in India" In the *Chittagong Armoury Raid Case*[3] it was held that attack on Europeans and Anglo-Indians "who might be expected to be supporters of the Government" constituted "waging war against the King" It was further held that violent obstruction to arrest was an overt act in pursuance of the conspiracy, for it is immaterial, in the case of a rebel in arms against the Crown and in unlawful possession of deadly weapons, whether he used those weapons in acts of aggression or of resistance" No authority was cited for this dangerously wide proposition

In a recent case, arising out of the disturbances of 1942, it was argued before the Patna High Court[4] that the evidence disclosed "rioting" and not "waging war against the King," and the following passage in the summing up Tindal C J in *Frost's Case*[5] was relied upon "I think the rule of law may

1 *In Emperor vs Nilkanta* (1912) 14 I C 849, Sankaran Nair J in his dissenting judgment described the conspiracy as "contemptible and farcical" p 896 The majority said "Although in a sense the conspiracy was contemptible it was certainly not negligible"
2 (1911) 10 I C 582 at pp 585-6
3 *Suryakumar Sen vs Emperor* A I R 1934 Cal 221 at p 228
4 *Jubba Mallah vs Emperor* A I R 1944 Pat 58
5 (1839) 4 State Tr N S 86 at p 442

be laid down in a few words in this manner to constitute high treason by levying war, there must be an insurrection, there must be force accompanying that insurrection, and it must be for the accomplishment of an object of a general nature" The argument was accepted by the Court and it was observed "Prima facie, the persons who made such an attack (on a police station), were guilty of rioting and if the Crown charged them instead with waging war against the King, it was incumbent on the Crown to show that there was an insurrection and not a riot, and that the insurrection was for the accomplishment of the object of a general nature" On the facts it was found by the High Court that "quite clearly there was an insurrection with an object of general nature" There was an appeal to the Federal Court[1] in this case The Court declined to assess the weight of evidence for themselves and accepting as final the conclusions of fact arrived at by the High Court, dismissed the appeal

(B)—The Law of allegiance

The law of treason is inter-related to the law of allegiance As observed by the Law Commissioners,[2] "waging war" seems naturally to import levying of war by one who throwing off the duty of allegiance arrays himself in open defiance of the Sovereign in like manner and by the like means as a foreign enemy would do, having gained footing within the realm The duty of allegiance is owed, perpetually by a subject and temporarily by an alien friend A subject may be either natural-born or naturalised Among the subjects, those born within the King's dominions and allegiance form, by far, the most numerous group A certificate of naturalisation may be issued under the Parliamentary statute[3] entitling the holder to the privileges of a British subject throughout the Empire A certificate issued under the Indian statute[4] confers such privileges in British India only

An alien friend, while in the country enjoys protection for his own person, family and effects He has got a right to seek relief in courts as if he is a subject of the King[5] In return he owes a temporary and local allegiance to the Crown to the same extent as a British subject On an

1 *Jubba Mallah vs Emperor* 1944 F C R 61 at p 113
2 2nd Report S 10
3 British Nationality and Status of Aliens Act, 1914
4 Naturalisation Act, 1926
5 Sec 83 Civil Procedure Code

application for writ of Habeas Corpus with respect to a French subject arrested in British India and detained under the provisions of a special statute,[1] Remfry J said[2] "By the mere fact that he entered British India he made himself amenable to the laws of British India A foreign subject comes within the purview of all Acts in force in British India, if he chooses to come within this country, unless indeed any such Act exempts the foreigners The French law, as far as I am aware, does not purport to give its subjects any privilege or immunity in foreign countries, nor would any such French law, if it existed, be of any avail in British India There is no provision in International law, nor under any convention or treaty, which protects foreigners from the law of the land, once they entered British India"

The Indian law of treason lays down that "whoever" commits the offence is liable to punishment Does the use of the word "whoever" without any restrictions comprehand an alien enemy? There is no judicial decision in India on this point An alien enemy, residing in India with the permission of the Central Government, has got a right of suit in courts under section 83 of the Civil Procedure Code It was held by a single Judge of the Allahabad High Court[3] that where a German woman was not interned after the declaration of war on Germany in 1914 she was presumed to have received such permission and had the right of suit Such an alien enemy, it is submitted, is liable to the law of treason[4] But whether an alien enemy, who has not received the protection of the Crown, is liable under Indian law of treason is an open question

(C)—The Position of the Indian States

The teeming millions residing in India,[5] cannot be divided merely under the broad divisions of subjects and aliens The rulers and the people of the Indian States, or the people in tribal areas, do not fall in either category. This is clear from the various provisions of the Constitution Act itself For instance, section 262, dealing with the question of eligibility for office, recognises that the rulers and people of Indian States are not British subjects, and makes special provisions for their being appointed to offices Similarly the

1 Bengal Criminal Law Amendment Act, 1930
2 *Jitendranath Ghosh vs Emperor* A I R 1932 Cal 753 at p 755
3 *Reiffsteck vs Reiffsteck* (1917) 39 I C 862
4 Halsbury "Laws of England" 2nd edn Vol I p 449 note (h)
5 For definition of "India" see General Clauses Act, 1897, Sec 3 (27)

rules about the composition of the provincial legislatures and about franchise in the fifth and sixth schedules to the Act make special provisions about eligibility of Rulers and people of the States to be voters and members of the legislatures The interim constitution for the centre, as given in the ninth schedule to the Act, provides for the nomination of a Ruler or a subject of a State to the Central Legislative Assembly On being so nominated, the member takes the oath "to be faithful and bear true allegiance *in his capacity as such member*", and if he is a State subject, further makes "saving of the faith and allegiance to his own Ruler"

Is a ruler or a subject of an Indian State an alien? In *Maharaja of Faridkot us Anantram*[1] Jailal J (Fforde J concurring) said "It cannot be held by any stretch of language that the Raja of Faridkot is an alien Admittedly he is in subordinate alliance with the British Government and thus owes allegiance to the British Crown, and therefore he cannot be held to be an alien" This finding is supported by his Lordship by the following reasoning (1) the dominions of the Crown include any place situate within the territory of a Prince who is subject to Crown of England in respect of such territory (2) any one born within the dominions of the Crown are born within the allegiance of the Crown It is submitted, with great respect, that the above reasoning is not correct Had it been so, the Rulers and subjects of Indian States would have been British subjects within the meaning of the British Nationality and Status of Aliens Act, 1914,—a conclusion that is directly negatived by the Constitution Act itself The territory of an Indian State is not the dominion of the British Crown for the purpose of giving the status of British subjects to the persons born within it. In the words of Dicey[2] "It is not sufficient that a person should be born in a State over which the British protectorate is exercised to confer upon him the quality of a British subject Thus although Egypt was in 1921 a State under British protection, an Egyptian was not a British subject, and the natives of the native States in India, which do not form part of British India, are not British subjects fot the purposes of English law" Nizam's assignment in perpetual lease of Berar to the Government of India, was immediately followed by an Order in Council under the Foreign Jurisdiction Act, 1890, and thus "jurisdiction was acquired in as ample a manner as it would have been by the cession or conquest of

1 (1928) 114 I C 62 at p 69
2 "Conflict of Laws" 4th Edn p 259.

the territory"[1] The implication is obvious that before the making of the Order in Council the inhabitants were not British subjects

It may further be noted that in the recent Indian statutes[2] relating to foreigners, "a ruler or a subject of an Indian State" had to be excepted in terms in the definitions of the word "foreigner" in addition to the exception made of British subjects Where in the earlier Act of 1864[3] there was no such express exception, it was held by the Bombay High Court[4] that an inhabitant of a portion of British India, ceded to an Indian Ruler, became a 'foreigner' after such cession and was liable to be dealt with as such, The conclusion therefore may be stated with confidence that a subject of an Indian State is a foreigner in the eyes of the law and express statutory authority is necessary either to invest him with rights and privileges or to exempt him from disabilities imposed on the foreigners in general A Ruler of a Native State in his political capacity is a foreign Government in the eyes of the Indian municipal law Recently the Privy Council[5] has held that the Ruler of Patiala is a "Government of a part of His Majesty's Dominions exclusive of British India" within the meaing of Government Trading Taxation Act, 1926 The Civil Procedure Code[6] expressly provides for a State Ruler's right of suit and liability to be sued in Indian Courts under certain conditions—provisions which would have been unnecessary had he been a subject owing allegiance to the Crown

The duty of allegiance carries with it the further duty of conveying to the authorities information about treasonable offences[7] This is statutorily laid down in section 45 of the Criminal Procedure Code Omission to give such information is punishable as an offence under secs 112, 175, and 202 I P C But there is no duty cast upon the citizen to concoct a story and give false information[8]

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1 See *Dattatriya vs Secretary of State* A I R 1930 P C 267
2 (i) The Registration of Foreigners Act 1939 (ii) The Foreigners Act,1940
3 The Foreigners Act, 1864
4 *Jagardas Tewari vs Emperor* (1925) 90 I C 310 See also *Gokaldas vs Emperor* A I R 1933 Sind 333
5 *Patiala State Bank vs Income Tax Commissioner* A I R 1943 P C 181
6 Secs 84-87
7 *Goman Saya vs Emperor* (1913) 21 I C 658 at p 663
8 *Shiam Lal vs Abdul Raoof* A I R 1935 All 538 at p 541,

CHAPTER XIII

Epilogue

The results of our study may be summed up in the following propositions (1) that it is the law that rules (2) that there is a recognised demarcation between ordinary law and special law[1] (3) that ordinary law is primarily based on the common law of England (4) that there are ordinary courts to which the subject's right of access cannot be barred except by law (5) that these courts are guided by English judicial traditions in administering justice

These propositions may appear to-day to be self-evident or axiomatic But they have had a slow and gradual, and sometimes painful, growth Even to-day there are layers of society into which legalism has not penetrated deep enough To an ignorant villager, a policeman or a chowkidar is even today but the local representative of unrestrained autocracy somewhere in the metropolis, and not an officer armed only with the powers which the law gives him and nothing more, which he actually is As late as 1887, a jurist of the eminence of Justice Mahmood[2] expressed his thankful appreciation of "the blessings of religious toleration and individual liberty which wise laws had accorded to the people of this country" and contrasted them to "the oppresive methods to which they had long been accustomed" A case of contrast between "a system of government according to the will of ruler" and "a system of government according to law" came up before the Privy Council[3] in 1905 That case reminds us that a large portion of our country, comprised in the Indian States, is still "administered according to the former principle" There is is not the law that rules

Where there is a law it binds the subject who is

1 The title of the Act of 1922 repealing repressive laws is 'An Act to repeal certain special enactments supplementing the ordinary criminal law"

2 Per Mahmood J in *Queen Empress vs Imam Ali* (1887) 10 All 150 at pp 157-158

3 *Devchand Chottamlal* (1905) 33 Cal 219 P C at p 256 This case dealt with Agency Courts, which are now functioning under Orders in Council under Foreign Jurisdiction Act, 1890 See *Bhadwa Taluka Case* A I R 1944 Jour 5 (8).

affected by it and it is his bounden duty to conform to its provisions[1] The courts will relentlessly apply the sanction in case of disobedience But where a right arises under the law, the Indian courts equally unhesitatingly make it effective The Calcutta High Court[2] issued an injunction to the President of the Bengal Legislature under the old Constitution Act restraining him from allowing a demand of grant for ministers' salaries to be moved in the Legislature, as such motion was barred under the statutory rules and standing orders of the Legislature A Legislature in India is a statutory creation It is not protected by the privileges with which the common law clothes the English Parliament Therefore it was held that the statutory rules and standing orders which governed the functioning of the Legislature were matters subject to judicial determination Ghose J said "The learned Advocate-General has contended that the Legislature is supreme and that neither the judiciary nor the executive should interfere in any way with the conduct of business in Legislative Council I am perfectly aware of the fact that in England the Legislature is supreme but what I have to consider on the present application is not whether English Parliament is Supreme, but whether the Bengal Legislative Council, which is a subordinate legislature and a creation of Parliament, is supreme as contended for by the learned Advocate-General and whether the jurisdiction of the High Court, so far as the President of the Legislative Council is concerned, is excluded by statute or judge-made law or by implication This Court is a Supreme Court of Record and *prima facie* no matter is deemed to be beyond the jurisdiction of this Court, unless it is expressly shown to be so There is nothing in the Government of India Act to exclude the jurisdiction of this Court I do not disguise from myself that it is a serious thing to have to interfere with the President in the discharge of his duties But the law, as I conceive it to be, requires my interference"

To over-ride this decision, the present Constitution Act enacts[3] that no officer or other member of a Legislature in whom powers are vested by or under this Act for regulating procedure or the conduct of business or for maintaining order, in the Legislature shall be subject to the jurisdiction

1 Per Lord Herschell in *Institute of Patent Agents vs Lockwood* (1894) A C 347 at p 361 quoted in Das J's dissenting judgment in *Emperor vs Abdul Hamid* (1922) 68 I C 945 at p 950

2 *Kumar Shankar Roy vs Cotton* (1924) 85 I C. 14 at p. 16.

3 See 87 (2) Government of India Act, 1935,

of any Court in respect of the exercise by him of those powers With reference to this provision a Full Bench of the Calcutta High Court observes[1] "The President raised the defence that he was absolutely protected and that this Court could not interfere with any thing that he did There are, of course, very weighty reasons why the legislature should be independent of other branches of the administration and it is not disputed that this section does protect the President from interference by this Court when he is acting in accordance with powers conferred by him But it would not protect him if he was acting in defiance of the provisions of the statute and the rules made thereunder or exercising some power which he does not possess"

In the *Bhadwa Taluka Case*[2] the question of attachment of a small State to a bigger neighbouring State came in for judicial determination Ordinarily such an act would have been a political act, an Act of State[3] But it was held that the Court had jurisdiction to determine the issue as the exercise of the power by the Crown Representative was controlled by a definite provision in the Constitution Act Davies J C, delivering the leading judgment, said "This is a municipal Court duly constituted and in view of the fact that the Government of India Act, 1935 is still in force in India, it is certainly the duty of this Court to adjudicate on the alleged breaches of the Act committed within its own jurisdiction When legislation receives the Royal Assent, it is now the accepted convention that the Royal Prerogative (in this case, in the matter of exercise of the functions of the Crown in its relations with Indian States) merges in the provisions of the Statute The Statute becomes the touchstone for the future acts of the Sovereign and those acts will invariably conform with the Statute's provisions" This decision is one of the finest examples of assertion of the supremacy of the law and the court

As the executive has no powers except under the law, even the extreme use of such power is subject to judicial investigation The High Court of Lahore, (and on appeal the Federal Court,) had before it a habeas corpus application

1 *Haridas Mazumdar vs Bijoy Prasad Singh Roy* (1945) F L J. 155 at p 168

2 A I R 1944 Jour 5 This decision led to the amendment of the Constitution Act, to give the Crown Representative the necessary powers.

3 See *In re Madhava Sing* (1904) 32 Cal 1 (P C) which is the leading decision on the question of Court's jurisdiction in the matter of Paramount Power's dealings with the States

for the release of a deposed ruler of a hill State detained under Bengal State Prisoners Regulation III of 1818 as amended by an Ordinance to authorise his detention in a mental hospital On the question of law the Federal Court[1] said "Once the Court is satisfied that a person is being detained under Regulation III of 1818 there is no jurisdiction under sec 491 Cr P Code which the Court can exercise in the matter The very basis of jurisdiction is s s (1) of sec 491 is expressed to be illegal or improper detention in public or private custody and yet by virtue of s s (3) in cases of persons detained under Regulation III of 1818 has no application It seems to us therefore to follow that something more than allegations that a person is being illegally or improperly detained can get over the bar to jurisdiction under the section imposed by s s (3) Complaints as to the illegality or impropriety of the detention be under Regulation III, can be dealt with under ss 3,4 and 5 of Regulation III and may well be the basis of other claims which a Court can properly entertain, but such allegations cannot in our judgment be sufficient to give the Court jurisdiction under sec 491 In on the facts of the case it is clear that a person is being detained under Regulating III, even though a Court might think if it investigated the facts, it might find that the detention was illegal or improper, still the Court cannot in our judgment interfere under sec 491 Only one point could possibly have enabled the Court to exercise jurisdiction under section 491, and that was if in fact the appellant is a person to whom Regulation III does not or cannot apply at all Then it might perhaps be possible to hold that there was no detention at all (legal or illegal, proper or improper) under Regulation III" But the ventilation of the detinue's grievances in Court led to the suggestion by the High Court to have the detinue again examined by a medical board for lunacy The Government adopted the suggestion, and the report made by the Board was produced before the Federal Court Their Lordships said 'We appreciate its production by the Advocate-General to us We are satisfied from this and from the further statement of the Advocate-General made to us that all proper care and attention is being given and is intended to be given to the applicant" This is a remarkable instance of the influence of the Court even in the cases of extreme use of executive power

1 *Bupal Sing vs Emperor* from judgment of the Federal Court delivered on the 31st of January 1946

A well deserved tribute was paid to the Indian judiciary by Sir B L Mitter,[1] Advocate-General of India, in his speech at the inauguration of the Federal Court He said "It is not often realised, and is seldom admitted that the most valuable asset of British rule in this country is the system of judicial administration Our High Courts command the respect and confidence of the people in a larger measure than any other institution in the country They have built up this position by their independence, impartiality and integrity The Federal Court is the inheritor of this precious heritage, with wider jurisdiction, higher authority and larger jurisdiction to vindicate the supremacy of the law"

Paradoxical as it may seem, the fact remains, that there have been times when judicial decisions, which were later overruled by the Privy Council, have enlarged the liberties of the subject In an earlier chapter reference has been made to the extension of habeas corpus, (as was held later) beyond the limits laid down by Parliamentary and Indian Statutes Vigorous criticism of the executive in *Talpade*[2] and *Benoarilal*[3] *cases*, by the Federal Court led to the broadening of the emergency legislations they dealt with though both the decisions were overruled by the Privy Council[4] on appeal The immediate effect of the Federal Court decisions was the provision for periodical examination by responsible authority of the cases of detention in one case and the abolition of trial by special courts in the other

In *Niharendu's case*[5] the Federal Court referred to one great deficiency in the Indian judicial machinery and that is the virtual absence of trial by jury The Criminal Procedure Code does indeed lay down[6] that all Sessions trials shall be with a jury or with the aid of assessors But the same Code[7] leaves it to the Executive to decide in what districts and in what classes of offences jury trials are to be had This leaving of discretion to the Executive has meant the almost complete absence of jury trials in cases which involve questions of the subject's rights and liberties In *Alipore Treason Case*[8] it was

1 1939 F C R at p 4
2 1943 F C R 49
3 1943 F C R 96
4 *Emperor vs Shibnath Banerji* (1945) F L J 222 (P C) *Emperor vs Benoarilal* (1945) F L J 1 (P C)
5 1942 F C R 38
6 Sec. 268
7 Sec 269
8 *Barindra Kumar Ghose vs K E* (1909) 7 I. C 359 at pp 377-78

contended that the Criminal Procedure Code, in so far as it interferes with the indefeasible right of every British subject, be he European or Indian, to be tried by jury is void as being *ultra vires* of the Indian Legislature, as conflicting with sec 65 (2) of the old Constitution Act[1] Carnduff J, after referring to the decision in *In re Ameer Khan*,[2] said "Trial by jury as known to the common law of England, that is to say, trial by the unanimous voice of twelve of one's peers, is unknown in India, and it seems to me too late now to question the validity of every law regulating criminal procedure that has been enacted in this country under the Statutes of 1833 and 1861, and the legality of every trial held, whether by jury or with the aid of assessors in the mofussil, or by jury before the Supreme or the High Court, during the last seventy-six years at least"

Where there is no notification by the Provincial Government about trials being held by jury, a trial in the sessions court must be held with the aid of assessors[3] The contrast between trial by jury and trial with the aid of accessors is that, in the former, the jury is the real tribunal but is aided by the judge, but in the latter the judge is the sole tribunal aided by each of the assessors The jury form a tribunal or body with a foreman, and the verdict is the verdict of the body, and when there is no unanimity among the members of the body, the opinion of the majority prevails as the verdict of the body In the case of assessors the principle is that the judge should have before him the individual and the independent opinion of each assessor[4] It is common experience that the opinions of the assessors are but seldom effective in the decision of the case[5]

In Dicey's conception of rule of law, the Courts and the Parliament are integrally linked together. It is the Parliament that can invest the Executive with extraordinary powers, and when the executive is so invested, the Parliament vigilantly watches the exercise of those powers As

1 See Chapter I (B) *ante*

2 (1870) 6 B L R 392

3 *Skilling* 18 P R 1888

4 Per Bhashyam Ayyangar J in *Emperor vs Tirumal and Subbi* (1901) 24 Mad 523 at pp 536-7-8

5 In *Meerut Conspiracy Case* A I R 1933 All 690 Sulaiman C. J. gave due weight to the opinions of the assessors

the Parliament can express its will only through an Act of Parliament, the executive in the exercise of its extraordinary power comes under judicial control, for an Act of Parliament must be interpreted by the judges, "who are influenced by the feeling of magistrates no less than by the general spirit of the common law "[1] In his lecture on the Army, Dicey deals only with Parliament's control over the military forces of the Crown, so that they may not become the tools of despotism Similarly he emphasises the absolute Parliamentary control over the collection and expenditure of revenue, to show that the subject is not liable to exactions by executive authority alone

In India we have got the law and the courts but no Indian Parliament (at least till very recently) Here there is the combination or the ruler and the legislator—a combination that spells despotism "In all tyrannical Governments" said Blackstone[2] "the Supreme Majesty, or the right both of making and enforcing law, is vested in the same man or one and the same body of men, and when these two powers are united together there is no public liberty " India has known only too well this 'tyrannical' exercise of governmental powers But standing on the threshhold of our freedom and viewing things dispassionately it is not difficult to realize that such exercise of powers has been called forth by the political conflict between the rulers and the ruled and has been regarded by the executive itself as something out of the ordinary "Ordinary law" has ensured to the Indian people substantially the same rights and liberties as obtain in other parts of the Commonwealth

The Rule of Law, in the fundamental meaning given to it by Dicey, is the legacy that British connection will leave to free India It will be the foundation of civil liberties of the Indian citizen of the future, when in addition to the law and the courts, we have our own Parliament It is tempting in this connection to review the activities of the autonomous Governments formed under the present Constitution Act But it is not pertinent to the subject of this thesis It is enough to quote the opinion of Sir Harry Haig, Governor of the United Provinces[3] "To sum up conclusions on events and tendencies of such

1 "Law of the Constitution" p 413

2 "Commentaries" I ii p, 146,

3 Quoted in Sapru Committee's Report p 28

complexity and variety is perhaps to risk misunderstanding owing to the necessary brevity of expression But if I am to take that risk I would say that the experiment of introducing full democratic institutions among a people who still instinctively think in authoritarian terms, who view the Government as somebody's 'Raj', has been launched with a success beyond expectation "

END

APPENDIX I

NEHRU COMMITTEE'S REPORT (1928)

From Chapter VI

The resolution of the Madras Congress lays down that the basis of the constitution must be a Declaration of Fundamental Rights Considerable stress has been laid on this and all the draft constitutions we have considered have formulated such a declaration Canada, Australia, and South Africa have no declaration of rights in their constitutions but there are various articles to be found in the constitution of the Irish Free State which may properly be grouped under the general head "fundamental rights" The reason for this is not far to seek Ireland is the only country where the conditions obtaining before the treaty were the nearest approach to those we have in India The first concern of the people of Ireland was, as indeed it is of the peole of India to-day, to secure fundamental rights that have been denied to them The other dominions had their rise from earlier British settlements which were supposed to have carried the law of England with them Ireland was taken and kept under the rule of England against her own will and the acquisition of dominion status by her became a matter of treaty between the two nations We conceive that the constitutional position in India is very much the same That India is a dependency of Great Britain cannot be denied That position can only be altered in one of two ways—force or mutual consent It is the latter in furtherance of which we are called upon to recommend the principles of a constitution for India In doing so it is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances With perhaps less reason than we have most of the more modern constitutions of Europe have specific provisions to secure such rights to the people

Declaration of Rights

Another reason why great importance attaches to a declaration of rights is the unfortunate existence of communal differences in the country Certain safeguards and guarantees are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion We could not better secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the constitution

A reference to the various clauses of the declaration of fundamental rights as adopted by us will show that we have kept both these aspects in view

The first committee of the All Parties Conference went into this question carefully and we have adopted most of their articles We have added to the declaration an independent recommendation regarding the rights of labour and peasantry, made by the first committee, with the exception that "Parliament shall make laws to ensure fair rent and fixity of tenure to agricultural tenants" We have left this out not because we do not approve of fixity of tenure but because we felt that if this was made a fundamental right it might become more of hinderance and obstruction in the way of the tenantry, preventing future progress, than a safeguard.

Fixity of tenure

The present system of land tenure in large parts of India is anything but desirable and requires radical change We recognise that the present condition of the tenantry is very deplorable and even some fixity of tenure would bring great relief But it would be a short-sighted policy indeed if to gain some relief now we were to barter away the future rights of the peasantry So long as the present system endures the rights of the tenants might be safeguarded by the article in the Declaration of Rights requiring Parliament, i e, the Parliament of India, to make suitable laws for securing a living wage for every worker

Right to use of roads etc

We have added an article to the Declaration dealing with the right of all citizens to access to, and use of, public roads, public wells, and all other places of public resort This may be considered obvious enough but in view of the peculiar circumstances and the customs prevailing in some parts of the country we feel that it is desirable to lay emphasis on it

No distinctions of caste in schools

Certain changes and additions have also been made in some other articles In the article dealing with the right to free elementary education we have added that there will be no " distinction of caste or creed in the matter of admission into any educational institutions maintained or aided by the state "

Habeas Corpus

To the right to a writ of habeas corpus we have added that in case the central legislature is not sitting during a war or rebellion the executive authority of the Commonwealth will be entitled to suspend the right for the time being but the central legislature must be informed at the earliest opportunity for such action as it may deem fit

Kirpans

At the request of our colleague Sardar Mangal Singh we have added a note to the Declaration acknowledging the right of the Sikhs to carry kirpans on any occasion —Pp 89-90-91

From Chapter VII

Fundamental Rights

(i) All powers of government and all authority, legislative, executive and judicial, are derived from the people and the same shall be exercised in the Commonwealth of India through the organisations established by or under, and in accord with, this constitution

(ii) No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered or confiscated, save in accordance with law

(iii) Freedom of conscience and the free profession and practice of religion are, subject to public order or morality, hereby guaranteed to every person

(iv) The right of free expression of opinion, as well as the right to assemble peaceably and without arms, and to form associations or unions, is hereby guaranteed for purposes not opposed to public order or morality

(v) All citizens in the Commonwealth of India have the right to free elementary education without any distinction of caste or creed in the matter of admission into any educational institutions, maintained or aided

by the state, and such right shall be enforceable as soon as due arrangements shall have been made by competent authority

(vi) All citizens are equal before the law and possess equal civic rights

(vii) There shall be no penal law whether substantive or procedural of a discriminative nature

(viii) No person shall be punished for any act which was not punishable under the law at the time it was committed

(ix) No corporal punishment or other punishment involving torture of any kind shall be lawful

(x) Every citizen shall have the right to a writ of habeas corpus Such right may be suspended in case of war or rebellion by an Act of the central legislature or, if the legislature is not in session, by the Governor-General in Council, and in such case he shall report the suspension to the legislature at the earliest possible opportunity for such action as it may deem fit

(xi) There shall be no state religion for the Commonwealth of India or for any province in the Commonwealth nor shall the state either directly or indirectly endow any religion or give any preference or impose any disability on account of religious belief or religious status

(xii) No person attending any school, receiving state aid or other public money, shall be compelled to attend the religious instruction that may be given in the school

(xiii) No person shall by reason of his religion, caste or creed be prejudiced in any way in regard to public employment, office of power or honour and the exercise of any trade or calling

(xiv) All citizens have an equal right of access to and use of, public roads, public wells and all other places of public resort

(xv) Freedom of combination and association for the maintenance and improvement of labour and economic conditions is guaranteed to everyone and of all occupations All agreements and measures tending to restrict or obstruct such freedom are illegal

(xvi) No breach of contract of service or abetment thereof shall be made a criminal offence

(xvii) Parliament shall make suitable laws for the maintenance of health and fitness for work of all citizens, securing of a living wage for every worker, the protection of motherhood, welfare of children, and the economic consequences of old age, infirmity and unemployment

(xviii) Every citizen shall have the right to keep and bear arms in accordance with regulations made in that behalf

(xix) Men and women shall have equal rights as citizens

Note—Notwithstanding anything to the contrary in article IV the Sikhs are entitled to carry Kripans

APPENDIX II

THE CONGRESS RESOLUTION (1933) ON FUNDAMENTAL RIGHTS

The Congress is of opinion that to enable the masses to appreciate what 'Swaraj' as conceived by the Congress will mean to them, it is desirable to state the position of the Congress in a manner easily understood by them In order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions The Congress, therefore, declares that any constitution which may be agreed to on its behalf should provide, or enable the Swaraj Government to provide for the following

Fundamental Rights And Duties

1 (i) Every citizen of India has the right of free expression of opinion, the right of free association and combination, and the right to assemble peacefully and without arms, for purposes not opposed to law or morality

(ii) Every citizen shall enjoy freedom of conscience and the right freely to profess and practise his religion, subject to public order and morality

(iii) The culture, language and script of the minorities and of the different linguistic areas shall be protected

(iv) All citizens are equal before law, irrespective of religion, caste, creed, or sex

(v) No disability attaches to any citizen, by reason of his or her religion, caste, creed, or sex, in regard to public employment, office of power or honour, and in the exercise of any trade or calling

(vi) All citizens have equal rights and duties in regard to wells, tanks, roads, schools and places of public resort, maintained out of State or local funds, or dedicated by private persons for the use of the general public

(vii) Every citizen has the right to keep and bear arms, in accordance with regulations and reservations made in that behalf,

(viii) No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered, or confiscated, save in accordance with law.

(ix) The State shall observe neutrality in regard to all religions

(x) The franchise shall be on the basis of universal adult suffrage

(xi) The State shall provide for free and compulsory primary education

(xii) The State shall confer no titles

(xiii) There shall be no capital punishment

(xiv) Every citizen is free to move throughout India and to stay and settle in any part thereof, to acquire property and to follow any trade or calling, and to be treated equally with regard to legal prosecution or protection in all parts of India

Labour

2 (a) The organization of economic life must conform to the principle of justice, to the end that it may secure a decent standard of living

(b) The State shall safe-guard the interests of industrial workers and shall secure for them, by suitable legislation and in other ways, a living wage, healthy conditions of work, limited hours of labour, suitable machinery for the settlement of disputes between employers and workmen, and protection against the economic consequences of old age, sickness, and unemployment

3 Labour to be freed from serfdom and conditions bordering on serfdom

4. Protection of women workers, and specially, adequate provision for leave during maternity period

5 Children of school-going age shall not be employed in mines and factories

6 Peasants and workers shall have the right to form unions to protect their interests

APPENDIX III

SIMON COMMISSION REPORT (1930)

Safeguards for Minorities

We have had abundant evidence of the feeling of apprehension with which possible changes in the system of government are viewed by many communities. India is a land of minorities The spirit of toleration, which is only slowly making its way in Western Europe, has made little progress in India Members of minority communities have unfortunately only too much reason to fear that their rights and interests will be disregarded The failure to realise that the success of a democratic system of government depends on the majority securing the acquiescence of the minority is one of the greatest stumbling blocks in the way of rapid progress towards self-government in India Many of those who came before us have urged that the Indian constitution should contain definite guarantees for the rights of individuals in respect of the exercise of their religion and a declaration of the equal rights of all citizens We are aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the War Experience, however, has not shown them to be of any great practical value Abstract declarations are useless, unless there exists the will and the means to make them effective Until the spirit of tolerance is more widespread in India and until there is evidence that minorities are prepared to trust to the sense of justice of the majority, we feel that there is indeed need for safeguards But we consider that the only practical means of protecting the weaker or less numerous elements in the population is by the retention of an impartial power, residing in the Governor-General and the Governors of provinces, to be exercised for this purpose —Vol II, para 36, pp 22-23

APPENDIX IV

THE WHITE PAPER OF DECEMBER, 1931

The Federal Legislature and the Provincial Legislatures will have no power to make laws subjecting in British India any British subject (including companies, partnerships or associations constituted by or under any Federal or Provincial law), in respect of taxation, the holding of property of any kind, the carrying on of any profession, trade, business or occupation, or the employment of any servants or agents, or in respect of residence or travel within the boundaries of the Federation to any disability or discrimination based upon his religion, descent, caste, colour or place of birth, but no law will be deemed to be discriminatory for this purpose on the ground only that it prohibits either absolutely or with exceptions the sale or mortgage of agricultural land in any area to any person not belonging to some class recognised as being a class of persons engaged in, or connected with, agriculture in that area, or which recognises the existence of some right, privilege or disability attaching to the members of a community by virtue of some privilege, law or custom have the force of law

A Federal or Provincial law, however, which might otherwise be void on the ground of its discriminatory character will be valid if previously declared by the Governor-General or a Governor, as the case may be, in his discretion, to be necessary in the interests of the peace and tranquility of India or any part there—Proposals Para 122 (p 331)

APPENDIX V

INDIAN ROUND TABLE CONFERENCE (THIRD SESSION) NOVEMBER-DECEMBER 1932

Fundamental Rights

In the agenda of the Conference the question of Fundamental Rights was purposely linked up with the question of the powers of the Legislatures, because it was felt that it had been insufficiently realised that the effect of inserting provisions of this kind in the Constitution must inevitably be (if they are to be more than expressions of a political ideal, which have never yet found a place in English constitutional instruments) to place statutory limitations on the powers of the new legislatures which may well be found to be of the highest practical inconvenience. The Government have not in any way failed to realise and take account of the great importance which has been attached in so many quarters to the idea of making a chapter of Fundamental Rights a feature in the new Indian Constitution as a solvent of difficulties and a source of confidence nor do they undervalue the painstaking care which has been devoted to framing the text of the large number of propositions which have been suggested and discussed The practical difficulties which might result from including many, indeed most of them as conditions which must be complied with as a universal rule by executive or by legislative authority were fully explained in the course of discussion and there was substantial support for the view that, as the means of securing fair treatment for majority and minorities alike the course of wisdom will be to rely, in so far as reliance cannot be placed upon mutual goodwill and mutual trust, on the " special responsibilities " with which it was agreed the Governor-General and the Governors are to be endowed in their respective sphere to protect the rights of minorities It may well be, however, that it will be found that some of the propositions discussed can appropriately and usefully find their place in the Constitution and His Majesty's Government undertook to examine them most carefully for this purpose In the course of discussion attention was drawn to the probability that occasion would be found, in connexion with the inauguration of the Constitution, for a pronouncement by the Sovereign and that, in that event, it might well be found expedient humbly to submit for His Majesty's consideration that such a pronouncement might advantageously give expression to some of the propositions brought under discussion which prove unsuitable for statutory enactment —Pp 62-63

APPENDIX VI

JOINT PARLIAMENTARY COMMITTEE'S REPORT (1933-34)

Fundamental Rights

The question of so-called fundamental rights, which was much discussed at the three Round Table Conferences, was brought to our notice by the British-India Delegation, many members of which were anxious that the new Constitution should contain a declaration of rights of different kinds, for reassuring minorities, for asserting the equality of all persons before the law, and for other like purposes, and we have examined more than one list of such rights which have been compiled The Statutory Commission observe with reference to this subject —" We are aware that such provisions have been inserted in many Constitutions, notably in those of the European States formed after the war Experience however has not shown them to be of any great practical value Abstract declarations are useless, unless there exist the will and the means to make them effective "[1] With these observations we entirely agree and a cynic might indeed find plausible arguments in the history during the last ten years of more than one country for asserting that the most effective method of ensuring the destruction of a fundamental right is to include a declaration of its existence in a constitutional instrument But there are also strong practical arguments against the proposal, which may be put in the form of a dilemma for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the Legislature and to create a grave risk that a large number of laws may be declared invalid by the Courts because inconsistent with one or other of the rights so declared An examination of the lists to which we have referred shows very clearly indeed that this risk would be far from negligible There is this further objection, that the States have made it abundantly clear that no declaration of fundamental rights is to apply in State territories, and it would be altogether anomalous if such a declaration had legal force in part only of the area of the Federation There are however one or two legal principles which might, we think, be appropriately embodied in the Constitution, and we direct attention to them in the paragraphs which follow There are others, not strictly of a legal kind, to which perhaps His Majesty will think fit to make reference in any Proclamation which He may be pleased to issue in connection with the establishment of the new order in India

Eligibility for holding public office, etc

367 Among the proposals in the White Paper is one which would put it beyond the power of any Legislature in British India to make laws (with certain exceptions) subjecting any British subject to any disability or discrimination in respect of a variety of specified matters, if based upon religion, descent, caste, colour or place of birth[2] This proposal seems to us too wide and we understand that His Majesty's

1 Report, Vol II, para 36
2 White Paper, Proposal 122

Government have, after consultation with the Government of India, arrived at the same conclusion We agree that some declaration of the general rights of British subjects in India is required, but we think that it would be preferable to base it upon the existing section of the Government of India Act We think that this declaration should provide that no British subject, Indian or otherwise, domiciled in India, shall be disabled from holding public office or from practising any trade, profession or calling by reason only of his religion, descent, caste, colour or place of birth , and it should be extended, as regards the holding of office under the Federal Government, to subjects of Indian States

Punjab Land Alienation Act

368 The proposal in the White Paper, however, contains a proviso which would in one respect, still further limit the effect of this narrower declaration of rights, namely, that " no law will be deemed to be discriminatory for this purpose on the ground only that it prohibits either absolutely or with exceptions the sale or mortgage of agricultural land in any area or to any person not belonging to some class recognised as being a class of persons engaged in, or connected with, agriculture in that area, or which recognises the existence of some right, privilege or disability attaching to members of a community by virtue of some privilege, law or custom having the form of law " This proviso is intended to cover legislation such as the Punjab Land Alienation Act which is designed to protect the cultivator against the money-lender This is no doubt a desirable object Inasmuch, however, as the full effect of the proviso cannot be foreseen and may have the result that the legitimate interests of minorities may be impaired while they are denied the right of appeal to the Courts for redress, we think that, in cases where the legitimate interests of minorities may be adversely affected and access to the courts is barred by this proviso in the Constitution, the Governor should consider whether his special responsibility for the protection of minorities necessitates action on his part

Expropriation of private property

369 We think that some general provision should be inserted in the Constitution Act safeguarding private property against expropriation, in order to quiet doubts which have been aroused in recent years by certain Indian utterances It is obviously difficult to frame any general provision with this object without unduly restricting the powers of the Legislature in relation particularly to taxation In fact, much the same difficulties would be presented as those which we have discussed above in relation to fundamental rights We do not attempt to define with precision the scope of the provision we have in mind, the drafting of which will require careful consideration for the reasons we have indicated , but we think that it should secure that legislation expropriating, or authorising the expropriation of, the property of particular individuals should be lawful only if confined to expropriation for public purposes and if compensation is determined, either in the first instance or on appeal, by some independent authority General legislation, on the other hand, the effect of which would be to transfer to public ownership some particular class of property, or to extinguish or modify the rights of individuals in it, ought, we think, to require the previous sanction of the Governor-General or Governor (as the case may be) to its introduction , and in that event he should be directed by his Instrument of Instructions to take into account as a relevant factor the nature of the provisions proposed for compensating those whose interests will be adversely affected by the legislation

370 But there is a form of private property—perhaps more accurately described as "vested interest"—common in India, which we think requires more specific protection We refer to grants of land or of tenure of land free of land revenue, or subject to partial remissions of land revenue, held under various names (of which Taluk, Inam, Watan, Jagir and Muafi are examples) throughout British India by various individuals or class of individuals Some of these grants date from Moghul or Sikh times and have been confirmed by the British Government others have been granted by the British Government for services rendered Many of the older grants are enjoyed by religious bodies and are held in the names of the managers for the time being The terms of these grants differ older grants are mostly prepetual, modern grants are mostly for three, or even two, generations But, whatever their terms, a grant of this kind is always held in virtue of a specific undertaking given by, or on the authority of, the British Government that, subject in some cases to the due observance by the grantee of specific conditions, the rights of himself and his successors will be respected either for all time or, as the case may be, for the duration of the grant A well-known instance of such rights is to be found in those enjoyed by the present Talukdars of Oudh, who owe their origin to the grant to the predecessors of sanads by Lord Canning, the then Governor-General, conferring propriety rights upon all those who engaged to pay the jumma which might then, or might from time to time subsequently, be fixed, subject to loyalty and good behaviour, and the rights thus conferred were declared to be permanent, hereditary, and transferable

Special case of grants of land or of tenure of land free of land revenue

371 It is not unnatural that the holders of privileges such as we have described should be apprehensive lest the grant of responsible Government and the consequent handing over to the control of Ministers and Legislatures of all matters connected with land revenue administration, should result in a failure to observe the promises which have been extended by Governments in the past to themselves or their predecessors in interest Some of the claims to protection which have been urged upon us in this connection would be satisfied by little less than a statutory declaration which would have the effect of maintaining unaltered and unalterable for all time, however strong the justification for its modification might prove to be in the light of changed circumstances, every promise or undertaking of the kind made by the British Government in the past We could not contemplate so far-reaching a limitation, upon the natural consequences of changes to responsible government We recommend, however, that the Constitution Act should contain an appropriate provision requiring the prior consent of the Governor-General or the Governor, as the case may be, to any proposal, legislative or executive, which would alter or prejudice the rights of the possessor of any privilege of the kind to which we have referred

Prior consent of Governor-General or Governor should be required to legislation affecting such grants

372 We have considered whether similar provision should be made to protect the rights of Zamindars and others who are the successors in interest of those in whose favour the Permanent Settlement of Bengal, Bihar and Orissa and parts of the United Provinces and Madras was made at the end of the 18th century Briefly, the effect of this Settlement was to give a proprietary right in land to the class described as Zamindars, on

The Permanent Settlement

the understanding that they collected and paid to Government the revenue assessed on that land, which was fixed at rates declared at the time to be intended to stand unaltered in perpetuity It is apparent that the position of Zamindars under the Permanent Settlement is very different from that of the individual holders of grants or privileges of the kind we have just described, for, while the privileges of the latter might, but for a protection such as we suggest, be swept away by a stroke of the pen with little or no injury to any but the holder of the vested interest himself the alteration of the character of the land revenue settlement in Bengal, for instance, would involve directly or indirectly the interests of vast numbers of population, in addition to those of the comparatively small number of Zamindars proper, and might indeed produce an economic revolution of a most far-reaching character Consequently, no Ministry or Legislature in Bengal could, in fact, embark upon, or at all events carry to a conclusion, legislative proposals which would have such results, unless they had behind them an overwhelming volume of public support We do not dispute the fact that the declarations as to the permanence of the Settlement, contained in the Regulations under which it was enacted, could not have been departed from by the British Government so long as that Government was in effective control of land revenue But we could not regard this fact as involving the conclusion that it must be placed beyond the legal competence of an Indian Ministry responsible to an Indian Legislature, which is to be charged inter alia with the duty of regulating the land revenue system of the Province, to alter the enactments embodying Permanent Settlement, which enactments despite the promises of permanence which they contain, are legally subject (like any other Indian enactment) to repeal or alteration Nevertheless, we feel that the Permanent Settlement is not a matter for which, as the result of the introduction of Provincial Autonomy, His Majesty's Government can properly disclaim all responsibility We recommend therefore that the Governor should be instructed to reserve for the signification of His Majesty's pleasure any Bill passed by the Legislature which would alter the character of the Permanent Settlement —Para 366 to 372 Joint Parliamentary Committee's Report (1933-34) pp 215-19

APPENDIX VII

CONSTITUTION (BASIC LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS (1936)

Basic Rights And Obligations of Citizens

Article 118 Citizens of the U S S R have the right to work, that is, the right to receive guaranteed work with payment for their labour in accordance with its quality and quantity

The right to work is ensured by the Socialist organisation of national economy, the steady growth of the productive forces of Soviet society, the elimination of the possibility of economic crises, and the abolition of unemployment

Article 119 Citizens of the U S S R have the right to rest

The right to rest is ensured by the reduction of the working day to seven hours for the overwhelming majority of the workers, establishment of annual vacations with pay for workers and employees, and provision of a wide network of sanatoriums, rest homes and clubs for the accommodation of the toilers

Article 120 Citizens of the U S S R have the right to material security in old age as well as in the event of sickness and loss of capacity to work

The right is ensured by the wide development of social insurance of workers and employees at the expense of the State, free medical aid for toilers and the provision of a wide network of health resorts for the use of the toilers

Article 121 Citizens of the U S S R have the right to education

This right is ensured by universal, compulsory elementary education, education free of charge—including higher education—by the system of state stipends for the overwhelming majority of students in higher schools, by instruction in schools in the native language, and by the organisation of free vocational, technical and agronomic education for the toilers in the factories, state farms, machine and tractor stations and collective farms

Article 122 Women in the U S S R are accorded equal rights with men in all fields of economic, state, cultural, social and political life

The realisation of these rights of women is ensured by affording women the right to work, payment for work, rest, social insurance and education, equally with men, by state protection of the interests of mother and child, granting pregnancy leave with pay, and by the provision of a wide network of maternity homes, nurseries and kindergartens

Article 123 The equality of the rights of citizens of the U S S R irrespective of their nationality and race, in all fields of economic, state, cultural, social and political life, is an irrevocable law

Any direct or indirect restriction of these rights, or conversely the establishment of direct or indirect privilege for citizens on account of race and nationality to which they belong, as well as any propagation of racial or national exceptionalism or hatred and contempt, is punishable by law

Article 124 To ensure to citizens freedom of conscience, the church in the U S S R is separated from the state and the school from the church Freedom to perform religious rites and freedom of anti-religious propaganda is recognised for all citizens

Article 125 In conformity with the interests of the toilers, for the purpose of strengthening the Social system the citizens of the U S S R are guaranteed by law

(a) freedom of speech ,

(b) freedom of press ,

(c) freedom of assembly and meetings ,

(d) freedom of street processions and demonstrations

These rights of the citizens are ensured by placing at the disposal of the toilers and their organisations printing presses, supplies of paper, public buildings, the streets, means of communication and other material conditions necessary for their realisation

Article 126 In conformity with the interests of the toilers and for the purpose of developing self-expression through organisation and political activity of the masses of the people, citizens of the U S S R are ensured the right of combining in public organisations trade unions, co operative associations, youth organisations, sport and defence organisations, cultural, technical and scientific societies, and for the most active and politically conscious citizens from the ranks of the working class and other strata of the toilers, of uniting in the Communist Party of the Soviet Union (Bolshevik), which is the vanguard of the toilers in their struggle to strengthen and develop the Socialist system and which represent the leading nucleus of all organisations of the toilers, both public and state

Article 127 The citizens of the U S S R are ensured inviolability of the person No one may be subjected to arrest except by decision of a court or with the sanction of a state prosecutor

Article 128 The inviolability of the homes of citizens and the secrecy of correspondence are protected by law

Article 129 The U S S R grants the right of asylum to foreign citizens persecuted for defending the interests of the toilers or for their scientific activity or for their struggle for national liberation

Article 130 Every citizen of the U S S R is obliged to observe the Constitution of the Union of Soviet Socialist Republics, to carry out the laws, observe the labour discipline, honestly regarding his social duties, and respect the rules of the Socialist community

Article 131 Every citizen of the U S S R is obliged to safeguard and consolidate public, Socialist property as the sacred, inviolable foundation of the Soviet system, as the source of the wealth and might of the fatherland, as the source of the prosperous and cultural life of all the toilers Persons attempting to violate public Socialist property are enemies of the people

Article 132 Universal liability to military service is the law.

Military service in the Workers' and Peasants' Red Army represent an honourable obligation of the citizens of the U S S R

Article 133 The defence of the fatherland is the sacred duty of every citizen of the U S S R Treason to the fatherland—violation of oath, desertion to the enemy, impairing the military might of the state, espionage—is punishable with the full severity of the law as the gravest crime

We now add our own summary of the Constitution, not in the Russian phraseology, but in terms enabling the British or American reader more easily to comprehend its purport, and not following the order of the legal text but rearranged so as to bring out its character as a new Declaration of the Rights of Man

THE TWELVE TABLES OF THE LAW

I The Right to work, and to be enabled to live by the work that must be found for all able-bodied adults, with their own option, alternatively, to join in independent co-operative productive societies, either in industry, agriculture or fishing, or to work individually on their own account, without the employment of hired labour

II The Right to leisure, by statutory limitation of the hours of employment in office, factory, mill or mine, together with the provision of paid holidays and of all approved means of happily using the leisure so ensured

III The Right of those who work at wages or salary by hand or by brain, and of their incapacitated dependants, collectively, to the entire net product of the labour so employed throughout the whole USSR, as annually ascertained

IV The Right to positive health of body and mind, so far as this can be secured by the widest possible use of preventive and curative medicine and surgery and of public sanitation, with wages in sickness and incapacity without waiting interval or time limit, and the ensuring of adequate nutrition and physical as well as mental training of all infants, children and adolescents

V The Right of Women to fulfil the function of motherhood with all possible alleviation of the physical suffering involved, without pecuniary sacrifice or burden, and further aided by universally organised provision for the care of infants and children

VI The Right to education equally for all races, without limit or fee, for persons of any age and either sex, with maintenance in suitable cases

VII The Right to prompt and adequate provision for the family on the death of any bread-winner or pensioner, with universally gratuitous funeral, and instant succour of the home

VIII The Right to superannuation at a definite age before senility or upon previous breakdown, with adequate non-contributory pension,

IX The Right to freedom of speech, freedom of assembly and of holding mass meetings, freedom of street processions and demonstrations and freedom of the press (from domination by capitalist, financial or counter-revolutionary ownership or control) These " rights of the citizens " by Article 125 " are ensured by placing

at the disposal of the toilers and their organisations " (including trade unions, co-operative societies, sport and other voluntary societies) printing presses, supplies of paper, public buildings, and other material requisites for the exercise of these rights, as well as by the prohibition of private profit-making and exploitation

X The Right to criticise every branch of the public administration, and to agitate for its improvement, by groups and associations of divers kinds, such as trade unions, co-operative societies and cultural associations, by speeches at public meetings and by printed matter yet without any organisation of merely political groups having no other common interest than public criticism or opposition, and without permission to individuals or factions to obstruct the execution of what has been finally decided on by the supreme elected legislature

XI The Right to elect, irrespective of nationality, race, sex or colour, freely, directly, secretly, equally and universally, from 18 years of age, to all governing assemblies from the lowest to the highest, without pecuniary, residential or other limiting qualifications, candidates being put forward by non-party groups of every description, as well as by the Vocation of Leadership known as the Communist Party This will produce an electorate numbering actually 55 per cent of the census population, as compared with one of less than 40 per cent in the United States and Great Britain, reduced as those are by requirements of residence and specific registration

XII The Right to inviolability of the person, and of his correspondence The right to be free from arbitrary arrest, as in other continental administrations, will not have what is so much cherished in England, the special protection of that unique British peculiarity, the Habeas Corpus Act But (Article 127) " the citizens of the USSR are guaranteed inviolability of person No person may be placed under arrest except by decision of a court or with the sanction of the judicial department of the State Attorney ", which is now made independent of the executive

THE BASIC DUTIES OF MAN

Unlike all other Declarations of the Rights of Man, notably the historic American Declaration of the Right of Man in 1776, and the French Revolutionary Declaration of 1793 the Soviet Constitution of 1936 supplements the Rights of Man by the Basic Duties of Man to the community in which he lives and has his being

First and most outstanding is Article 12 " Work in the USSR is a duty, a matter of honour, for every able-bodied citizen He who does not work shall not eat. " This duty not to be a parasite, living on the work of other men, is strikingly absent in Capitalist and Landlord Countries, whether democracies, or oligarchies, conservative or liberal In normal times, the so-called " leisured classes " are envied and honoured by their fellow men, they are never penalise

But this is not all In Articles 131, 132, 133 and 134, all citizens, male and female, young and old, are instructed to " strengthen public-socialist property, to regard it as the source of the wealth and power of the fatherland, of the health and happiness, the prosperity and culture of a

working people It is unnecessary to add that military service is the duty of all citizens "

" Treason to the Homeland, violation of the oath, desertion to the enemy, espionage, are to be punished with the full severity of the law " Thus there were no Quislings in the USSR, no Fifth Column, as there were in Denmark, Norway and Holland, and above all, in the much honoured Republic of France These undesirable citizens had been dealt with in the much abused Moscow Trials of the thirties

Perhaps it is this unique emphasis on the Duties of Man as necessary complement to the Rights of Man which is the peculiar characteristic of the Soviet Constitution of 1936 It explains why the defeated, starving, illiterate inhabitants of Tsarist Russia became in the course of twenty years the relatively comfortable and cultured, healthy and skilled, courageous Soviet people of 1941-42 , who alone among the inhabitants of the European Continent have been able to resist and beat back the mighty military machine of Hitler Germany, intent on the conquest and enslavement of the world —From ' SOVIET COMMUNISM " by Sidney and Beatrice Webb, 1937-42, pp 435-6-7

APPENDIX VIII

THE BILL OF RIGHTS, 1689

That the pretended power of suspending of laws or the execution of laws by regal authority without consent of parliament is illegal

That the pretended power of dispensing with laws or the execution of laws by regal authority as it hath been assumed and exercised of late is illegal

That the commission for erecting the late court of commissioners for ecclesiastical causes and all other commissions and courts of like nature are illegal and pernicious

That the levying money for or to the use of the crown by pretence of prerogative without grant of parliament for longer time or in other manner than the same is or shall be granted is illegal

That the raising or keeping a standing army within the kingdom in time of peace unless it be with consent of parliament is against law

That the freedom of speech and debates or proceeding in parliament ought not to be impeached or questioned in any court or place out of parliament

That excessive bail ought not to be required nor excessive fines imposed, nor cruel and unusual punishments inflicted

And that for redress of all grievances and for the amending, strengthening and preserving of the laws parliaments ought to be held frequently

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THE ACT OF SETTLEMENT, 1701

That whosoever shall hereafter come to the possession of this Crown shall join in communion with the Church of England as by law established.

That in case the Crown and imperial dignity of this realm shall hereafter come to any person, not being a native of this kingdom of England, this nation be not obliged to engage in any war or the defence of any dominions or territories which do not belong to the Crown of England, without consent of parliament

That after the said limitation shall take effect as aforesaid, judges' commissions be made quam diu se bene gesserint and their salaries ascertained and established, but upon the address of both houses of parliament it may be lawful to remove them

That no pardon under the great seal of England be pleadable to an impeachment by the commons in parliament

APPENDIX IX

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Article I Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances

Article II A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed

Article III No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law

Article IV The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized

Article V No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation

Article VI In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation, to be confronted with the witness against him, to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defense

Article VII In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law

Article VIII Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted

Article IX The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people

Article X The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people —From "The Government of the United States" by William Bennett Munro Pp 775-7

APPENDIX X

CONSTITUTIONAL PROPOSALS OF THE SAPRU COMMITTEE

Fundamental Rights

363 We recommend that Fundamental Rights should be incorporated in the future Constitution of India assuring—

" (a) the liberties of the individual,
(b) the freedom of Press and association
(c) equality of rights of citizenship of all nationals irrespective of birth, religion, colour, caste or creed,
(d) full religious toleration, including non-interference in religious beliefs, practices and institutions,
(e) protection to language and culture of all communities "

Then the recommendation goes on to say that " It should further contain specific declarations for the complete abolition of disabilities imposed by tradition and custom on the Scheduled Castes and the safeguarding of special religious customs like wearing of Kirpans by the Sikhs The precise formulation of these rights should be undertaken by a special committee of experts at the time of the framing of the new constitution "

365 Having given the matter our best consideration we have come to the conclusion that howsoever inappropriate the tabulation of fundamental rights may be in England and howsoever inconsistent it may be with the fundamental dogma of the British Constitution that fundamental rights are incompatiable with the sovereignty of Parliament, in the peculiar circumstances of India we are distinctly of the opinion that the framing of fundamental rights is necessary not only for giving assurances and guarantees to the minorities but also for prescribing a standard of conduct for the legislatures, Government and the courts The real difficulty will be in dividing fundamental rights into classes (1) Justiciable, and (2) non-Justiciable, but this difficulty must be faced We are alive to the danger of too much interference with the Executive Government on the part of the Judiciary, but we also realise that in the last resort in a Federal Constitution such as we envisage, the Judiciary is the final protector and guardian of the Constitution Difficult as the task may seem, it should not be impossible for competent and skilful lawyers to divide the fundamental rights in such a way that the breaches of some of them may form the subject of judicial pronouncement, and the breaches of others may be remedied without resort to courts of law This task obviously cannot be undertaken by us It will be for the Constitution-making Body first to settle the list of fundamental rights and then to undertake the division of fundamental rights into justiciable and non-justiciable and then to provide suitable machinery for the enforcement of both We should be sorry if constitutional jurists or lawyers under the spell of English law treated fundamental rights as nothing more than moral maxims or adages

366 Dealing with the question of fundamental rights an American writer of great authority—Cooley—observes in his book on Constitutional Limitations as follows —

" The common law of England consisted of those maxims of freedom, order, enterprise, and thrift which had prevailed in the conduct of public affairs the management of private business, the regulation of the domestic institutions, and the acquisition control, and transfer of property from time immemorial It was the outgrowth of the habits of thought and action of the people, and was modified gradually and insensibly from time to time as those habits became modified, and as civilization advanced, and new inventions introduced new wants and conveniences, and new modes of business Springing from the very nature of the people themselves, and developed in their own experience, it was obviously the body of laws best adapted to their needs, and as they took with them their nature so also they would take with them these laws whenever they should transfer their domicile from one country to another "—Pp 255-57

APPENDIX XI

Indian Round Table Conference (Second Session)

7th September—1st December, 1931

FOURTH REPORT OF FEDERAL STRUCTURE COMMITTEE

1 The Committee when discussing the subjects covered by this Report, viz, Defence, External Relations, Financial Safeguards and Commercial Discrimination, did not have the advantage of hearing the views of the Muslim members of the British Indian Delegation who reserved their opinion on such questions until such time as a satisfactory solution had been found of the problems which confronted the Minorities Committee Some other representatives of minorities similarly reserved their opinion

Defence

2 Our consideration of the question of Defence in its constitutional aspect is based on the principle enunciated in the Defence sub-Committee at the last Session that "The Defence of India must, to an increasing extent, be the concern of the Indian people, and not of the British Government alone"

3 The view was strongly put forward by some members that no true responsibility for its own government will be conferred on India unless the subject of Defence (involving, of course the control of the Army in India, including that of the British troops) is immediately placed in the hands of an Indian Ministry responsible to an Indian Legislature, with any safeguards that can be shown to be necessary

4 The majority of the Committee are unable to share this view They consider that it is impossible to vest an Indian Legislature during the period of transition the institutional responsibility for controlling Defence, so long as the burden of actual responsibility cannot be simultaneously transferred

5 The majority of the Committee therefore reaffirm the conclusion reached in the Committee at the last Session that "the assumption by India of all the powers and responsibility which have hitherto rested on Parliament cannot be made at one step and that during a period of transition, the Governor-General shall be responsible for Defence," being assisted by a 'Minister" of his own choice responsible to him and not to the Legislature

6 At the same time there is no disagreement with the view that the Indian Legislature must be deeply concerned with many aspects of Defence It is undeniable that there can be no diminution of such opportunities as the present Legislature possesses of discussing and through discussion of influencing Defence administration While the size, composition and cost of the army are matters essentially for those on whom the responsibility rests and their expert advisers, yet they are not questions on which there can be no voicing of public opinion through constitutional channels The Legislature would thus continue to be brought into the counsels of the Administration in the discussion of such

outstanding problems as the carrying out of the policy of Indianisation Further, there must be correlation of military and civil administration where the two spheres, as must sometimes inevitably be the case, are found to overlap In the latter connection the suggestion was made that a body should be set up in India analogous to the Committee of Imperial Defence in Great Britain Some members of the Committee considered that even though responsibility for the administration of the Army might remain, during a period of transition, with the Governor-General, the final voice on such questions as the size, composition and cost of the Army should rest with the Legislature

7 To secure the measure of participation contemplated under paragraph 6 by the majority of the Committee, various suggestions were made, the cardinal feature of which, in almost all instances, was the precise position to be assigned to the "Minister" appointed by the Governor-General to take charge of the Defence portfolio It was assumed that his functions would roughly correspond to those of the Secretary of State for War in the United Kingdom Among the more important proposals made were the following —

(i) The 'Minister," while primarily responsible to the Governor-General, should, as regards certain aspects only of Defence be responsible to the Legislature

(ii) The "Minister," though responsible to the Governor-General, should be an Indian, and he might be chosen from among the Members of the Legislature

(iii) The "Minister," of the character contemplated in (ii) should be considered to be a Member of the "responsible" Ministry, participating in all their discussions, enjoying joint responsibility with them and in the event of a defeat in Legislature over a question not relating to the Army should resign with them though, of course, remaining eligible for immediate reappointment by the Governor-General

8 While some of those suggestions contain the germs of possible lines of development, it is impossible to escape from the conclusion (a) that so long as the Governor-General is responsible for Defence, the constitution must provide that the Defence "Minister" should be appointed at the unfettered discretion of the Governor-General and should be responsible to him alone, and (b) that this "Minister's" relations with the rest of the Ministry and with the Legislature must be left to the evolution of political usage within the framework of the constitution

9 The view was put forward that, while supply for the defence services should not be subject to the annual vote of the Legislature, agreement should be sought at the outset on a basic figure for such expenditure for a period of, say, five years, subject to joint review by the Legislature and representatives of the Crown at the end of such period, with special powers in the Governor-General to incur expenditure in cases of emergencies The details of any such plan should receive further careful examination

External Relations

10 Very similar considerations to those governing the constitution treatment of Defence apply in the case of the subject of External Relations, and in general the views expressed by members of the Committee on

this subject followed closely their opinions regarding the constitutional provisions in relation to Defence In particular the majority of the Committee reaffirm the view taken in the Second Report of the sub-Committee (paragraph 11) that the Governor-General should be responsible for External Relations

11 There is, however, a difficulty in connection with External Relations which hardly arises in the case of Defence viz, that of defining the content of the subject The reserved subject of External Relations would be confined primarily to the subject of political relations with countries external to India and relations with the frontier tracts, Commercial, economic and other relations would fall primarily with the purview of the Legislature and of Ministers responsible thereto, in so far, however, as questions of the latter character might react on political questions a special responsibility will devolve upon the Governor-General to secure that they are so handlad as not to conflict with his responsibility for the control of external relations There will accordingly be need for close co-operation, by whatever means may prove through experience most suitable for securing it, between the Minister holding the portfolio of "External Relations" and his colleagues the "responsible" Ministers

12 Some misunderstanding may have been caused by the description, in paragraph 11 (ii) of the sub-Committee's second Report, of External Relations as incluing "Relations with the Indian States outside the Federal sphere" As set out in the Prime Minister's declaration at the close of the last Session, "The connection of the States with the Federation will remain subject to the basic principle that in regard to all matters not ceded by them to the Federation their relations will be with the Crown acting through the Agency of the Viceroy"

FINANCIAL SAFEGUARDS

13 In paragraph 11 of their Second Report the sub-Committee in recording the general agreement, to which reference has been made in an earlier paragraph of this Report, that the assumption by India of all the powers and responsibility which have hitherto rested on Parliament cannot be made at one step, recorded the consequential opinion that, during a period of transition in certain situations which may arise outside the sphere of the Reserved Subjects, the Governor-General must be at liberty to act on his own responsibility, and must be given the powers necessary to implement of his decision And in paragraphs 14 and 18 to 20 of the same Report, they then proceeded to indicate in some detail their view of those situations in the financial sphere for which such special provision would be necessary The proposals in this connection were, in the view of some members of the Committee, based upon the following fundamental propositions —

(1) that it is essential that the financial stability and credit of India should be maintained,

(2) that the financial credit of any country rests in the last resort upon the confidence of the investor, actual and potential,

(3) that one result of the connection which has subsisted between India and the United Kingdom has been that her credit in the money markets of the world has hitherto been in practice closely bound up with British credit, and

(4) that a change in her constitutional relations with the United Kingdom which involved a sudden severance of the financial

link between the United Kingdom and India would disturb confidence and so place the new Indian Government and Legislature at a grave disadvantage

14 The proposals designed to avert such a situation have been further discussed at the Committee's present Session While some members consider that in present circumstances the proposal in paragraphs 18 to 20 of the Second Report may not prove sufficient others have advanced the view that they erred on the side of caution, and that since there was no ground for postulating imprudence on the part of the responsible Executive and Legislature of the future, nothing further was required in order to ensure financial stability in addition to the normal powers of veto which would vest in the Governor-General, than the establishment, pending the creation by the Indian Legislature of a Reserve Bank of a Statutory Advisory Council, so constituted as to reflect the best financial opinion of both of India and London, which would be charged with the duty of examining and advising upon monetary policy (Some of those who took this view were of opinion that it might not be necessary for the Statutory Advisory Council to remain in existence after the Reserve Bank had been established) It was however suggested by those who held such views that it might be advisable to provide that in the event of the rejection by the Legislature of the Government's proposals for the raising of revenue in any given year, the provision made for the last financial year should continue automatically to be operative

Some members again, who had not participated in the Committee's earlier discussions, went further in their objection to the financial safeguards and expressed themselves as unwilling to contemplate any limitations upon the powers of an Indian Finance Minister to administer his charge in full responsibility to the Legislature, on the ground that a constitution which did not concede complete control of finance to the Legislature could not be described as responsible government and that derogation from complete control would hamper the Finance Minister in the discharge of his duties

15 The majority of the Committee adhere to the principles enunciated in their previous Report They feel strongly that if the attitude of caution with which they approached this question last January was justified—as they are convinced by the considerations stated in paragraph 13 of this Report that it was—the financial crisis which has since overwhelmed both the United Kingdom and India in common with so many other countries has still further reinforced its necessity They feel further that in the conditions of complete uncertainty and instability now so widely prevailing, it would serve no useful practical purpose here and now meticulously to examine or to attempt to decide upon the precise means to adopt to ensure and command confidence in the stability of the new order and a safe transition to it from the old The majority of the committee therefore record it as their view that the conclusions reached in the Committee's Second Report form an appropriate basis for approach to the task of framing the constitutional definitions of the powers and interplay in the sphere of finance of the various elements which will compose the Federal Authority which they envisage and that it would be premature at this stage to attempt to elaborate the application of these conclusions While they are prepared to explore more fully the suggestion of an Advisory Finance Council, they cannot on the basis of the discussion that has taken place commit themselves to the view that such

a Council would adequately secure the effective maintenance of confidence in the credit of India, which must be the essential test of the measure necessary in the sphere of finance

COMMERCIAL DISCRIMINATION.

16 On this subject the Committee are glad to be able to record a substantial measure of agreement They recall that in paragraph 22 of their Report at the last Conference it was stated that there was general agreement that in matters of trade and commerce the principle of equality of treatment ought to be established, and that the Committee of the whole Conference at their meeting on January 19th, 1931, adopted the following paragraph as part of the Report of the Minorities sub-Committee —

> "At the instance of the British Commercial community the principle was generally agreed that there should be no discrimination between the rights of the British mercantile community, firms and companies trading in India, and the rights of Indian born subjects, and that an appropriate Convention based on reciprocity should be entered into for the purpose of regulating these rights'

More than one member in the course of discussion also reminded the Committee that the All-Parties Conference in 1928 stated in their Report that "it is inconceivable that there can be any discriminating legislation against any community doing business lawfully in India '

17 The Committee accepted and re-affirm the principle that equal rights and equal opportunities should be afforded to those lawfully engaged in commerce and industry within the territory of the Federation, and such differences as have manifested themselves are mainly (though not entirely) concerned with the limits within which the principle should operate and the best method of giving effect to it

Some however contend that the future Government should not be burdened with any restriction save that no discrimination should be made merely on the ground of race colour or creed

18 The Committee are of opinion that no subject of the Crown, who may be ordinarily resident or carrying on trade or business in British India, should be subjected to any disability or discrimination, legislative or administrative by reason of his race, descent, religion, or place of birth in respect of taxation the holding of property the carrying on of any profession trade or business or in respect of residence or travel The expression 'subject' must here be understood as including firms, companies and corporations carrying on business within the rest of the Federation as well as private individuals The Committee are also of opinion that mutatis mutandis the principle should be made applicable in respect of the same matters so far as they fall within the federal sphere in the case of Indian States which become members of the Federation and the subjects of those States

The States representatives expressed themselves willing to accept this principle provided that those who claim equal rights under it do not ask for discrimination in their favour in the matter of jurisdiction and will submit themselves to the jurisdiction of the States

19 It will be observed that the suggestion contained in the preceding paragraph is not restricted to matters of Commercial Discrimination only nor to the European community as such It appears to the Committee that the question of Commercial Discrimination is only one aspect though

a most important one, of a much wider question, which affects the interests of all communities alike, if due effect is to be given to the principle of equal rights and opportunities for all

20 More than one member of the Committee expressed anxiety lest a provision in the constitution on the above lines should hamper the freedom of action of the future Indian Legislature in promoting what it might regard as the legitimate economic interests of India The Committee do not think that these fears are well-founded Key industries can be protected and unfair competition penalised without the use of discriminatory measures The Committee are, however, of opinion that it should be made clear that where the Legislature has determined upon some system of bounties or subsidies for the purpose of encouraging local industries, the right to attach reasonable conditions to any such grant from public funds is fully recognised, as it was recognised to-day by the practice of the Government of India itself

21 It should however also be made clear that bounties or subsidies, if offered, would be available to all who were willing to comply with such conditions as may be prescribed The principle should be a fair field and no favour Thus a good deal was said in the course of the discussion of the need for enabling Indian concerns to compete more effectively with larger and longer-established businesses, usually under British management and financed with British capital Where the larger business makes use of unfair methods of competition, the general law should be sufficient to deal with it, but many members of the Committee were impressed with the danger of admitting a claim to legislate, not for the purpose of regulating unfair competition generally, but of destroying in a particular case the competitive power of a large industry in order to promote the interests of a smaller one

A view was expressed by some members, with reference to this and the preceding paragraph, that so far as the grant of bounties and subsidies is concerned it must be within the competence of the Legislature to confine them to Indians with Indian capital

The position of others was that set out at the end of paragraph 17

22 With regard to method, it appears to the Committee that the constitution should contain a clause prohibiting legislative or administrative discrimination in the matters set out above and defining those persons and bodies to whom the clause is to apply A completely satisfactory clause would no doubt be difficult to frame, and the Committee have not attempted the task themselves They content themselves saying that (despite the contrary view expressed by the Statutory Commission in paragraph 156 of their Report) they see no reason to doubt that an experienced Parliamentary draftsman would be able to advise an adequate and workable formula, which it would not be beyond the competence of a Court of Law to interpret and make effective With regard to the persons and bodies to whom the clause will apply, it was suggested by some that the constitution should define those persons who are to be regarded as 'citizens' of the Federation, and that the clause should apply to the "citizens" as so defined, this indeed was a suggestion which had been made by the All-Parties Conference There are however disadvantages in attempting to define the ambit of economic rights in terms of a political definition, and a definition which included a corporation or limited company in the expression "citizen" would be in any event highly artificial The Committee are of opinion, therefore, that the clause should itself describe those persons and bodies

to whom it is to be applicable on the lines of paragraph 18, and that the question should not be complicated by definitions of citizenship.

23. If the above proposals are adopted, discriminatory legislation would be a matter for review by the Federal Court To some extent this would also be true of administrative discrimination : but the real safeguard against the latter must be looked for rather in the good faith and common sense of the different branches of the executive government reinforced, where necessary, by the special powers vested in the Governor-General and the Provincial Governors It is also plain that where the Governor-General or a Provincial Governor is satisfied that proposed legislation, though possibly not on the face of it discriminatory, nevertheless will be discriminatory in fact, he will be called upon, in virtue of his special obligation in relation to minorities, to consider whether it is not his duty to refuse his assent to the Bill or to reserve it for the signification of His Majesty's pleasure.

24. The question of persons and bodies in the United Kingdom trading with India, but neither resident nor possessing establishments there, requires rather different treatment. Such persons and bodies clearly do not stand on the same footing as those with whom this Report has hitherto been dealing. Nevertheless, the Committee were generally of opinion that, subject to certain reservations, they ought to be freely accorded, upon a basis of reciprocity, the right to enter and trade with India. It will be for the future Indian Legislature to decide whether and to what extent such rights should be accorded to others than individuals ordinarily resident in the United Kingdom or companies registered there, subject of course to similar rights being accorded to residents in India and to Indian companies. It is scarcely necessary to say that nothing in this paragraph is intended to limit in any way the power to impose duties upon imports into India, or otherwise to regulate its foreign trade.

25. It has been suggested at the last Conference, and the suggestion was made again in the course of the discussion in the Committee, that the above matters might be conveniently dealt with by means of a Convention to be made between the two countries, setting out in greater detail than it was thought would be possible in a clause in an Act the various topics on which agreement can be secured. The idea is an attractive one, but appears to present certain practical difficulties. The Committee understand that the intention of those who suggested it is that the Convention, if made, should be scheduled to and become part of the Constitution Act It was however, pointed out that such a detailed Convention would be more appropriately made between the United Kingdom and the future Indian Government when the latter was constituted, and that, in any event, it seemed scarcely appropriate in a Constitution Act. On the other hand, the Committee are of opinion that an appropriately drafted clause might be included in the Constitution itself, recognising the rights of persons and bodies in the United Kingdom to enter and trade with India on terms no less favourable than those on which persons and bodies in India enter and trade with the United Kingdom.

26 In conclusion, there was general agreement (subject to the views of certain members, set out at the end of paragraph 17) to the proposal that property rights should be guaranteed in the constitution, and that provision should be made whereby no person can be deprived of his property, save by due process of law and for public purposes, and then only on payment of fair and just compensation to be assessed by a Judicial

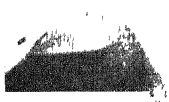
Tribunal. In the case of the States, this principle may need some modification to avoid conflict with their internal rights. A provision of the kind contemplated appears to the Committee to be a necessary complement of the earlier part of this Report Such a formula finds a place in many constitutions, and the form used in the Polish Constitution seemed to the Committee to be specially worthy of consideration.

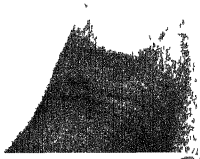
Signed, on behalf of the Committee.

ST. JAME'S PLACE, LONDON,

27TH NOVEMBER, 1931

SANKEY





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